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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-91

CHEVRON OIL COMPANY, WESTERN DIVISION; AMERADA HESS CORPORATION; EXXON COMPANY; MARATHON OIL COMPANY; and TEXACO INC.,

Petitioners,

vs.

FEDERAL POWER COMMISSION; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; ATLANTIC RICHFIELD COMPANY; BELCO PETROLEUM CORPORATION; BETA DEVELOPMENT COMPANY; CONTINENTAL OIL COMPANY; GULF OIL CORPORATION; HIGH CREST OILS, INC.; SKELLY OIL COMPANY; SUN OIL COMPANY; TENNECO OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; THE STATE OF NEW MEXICO; FOUR CORNERS GAS PRODUCERS ASSOCIATION; UNITED DISTRIBUTION COMPANIES; EL PASO NATURAL GAS COMPANY; PUBCO PETROLEUM CORPORATION; SOUTHERN CALIFORNIA GAS COMPANY; AZTEC OIL & GAS COMPANY; and SHELL OIL COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this action on February 20, 1973, denying consolidated petitions to review orders of the Federal Power Commission.

on an all-inclusive record with the revealing tests of cross-examination and consequential rebuttal, in favor of an abbreviated process of accumulating and "compositing" raw data and then applying administrative "expertise" and "experience." In the words of the court of appeals majority:

> "* * * the Commission has drastically changed the procedure from the traditional method involving trial-type adjudicatory proceedings to this rulemaking method. This is an informal hearing which is not conducted on the record and which does not afford an opportunity for cross-examination" (Appx. A, pp. 2-3).

Under section 5 of the Natural Gas Act, the rates determined by these proceedings will constitute the maximum rates petitioners will be permitted to charge for gas they have long since committed to the interstate market, and which they may not withdraw from that market or refuse to produce or sell absent the specific approval of the Commission (Natural Gas Act of 1938, § 7(b), 52 Stat. 824, 15 U.S.C. § 717f(b)). Furthermore, to the extent that their present rates have resulted from past rate increases subject to refund under section 4 of the Act, the rates so determined will subject the producers bound by the order to retroactive refund obligations with respect to past service.

By its July 15 order, the Commission ordered each producer to complete and file a questionnaire regarding its "flowing gas cost and operational data" on a 1969 "test year basis," within 45 days. Upon receipt of the data, the order prescribed that the Commission's staff would "composite and reconcile" such data and make copies of its composite available to any party. Additionally, the respondents were permitted to file by November 12, 1971, written "responses" concerning the proposed rulemaking, which would be available for public inspection in the Commission's Washington office, and to file "responses to the submittals" within two weeks thereafter (Appx. B, p. 32). No party was accorded

the opportunity to test the submissions of other parties or the staff by cross-examination at a hearing on a public record. The order provided that the Commission would "consider all such written submittals and responses" before issuing its order prescribing just and reasonable area rates.

In an application for rehearing and motion for reconsideration, petitioners challenged this procedure on the grounds that decisions construing the constitutional guarantee of due process of law and the plain language of sections 4 and 5 of the Natural Gas Act, as well as the Administrative Procedure Act (5 U.S.C. §§ 556, 557), required the Commission to accord producers an evidentiary hearing with opportunity to test the submissions of others by cross-examination, and with a decision "upon findings based on substantial evidence in the public record" (Joint Appendix in the Court of Appeals, p. 68). Producers further suggested procedures by which such hearings could be expedited. On September 7, 1971, the Commission denied this application for reconsideration (Appx. B, p. 38).

Subsequently petitioners filed a motion for cross-examination with the Commission listing nine specific areas in which cross-examination was necessary "by virtue of apparent disputes of material fact and recommendations of appropriate regulatory methods" revealed by the written "comments" submitted by other parties and the Commission's staff (Joint Appendix in the Court of Appeals, pp. 90-93). On December 16, 1971, the Commission denied this motion, indicating in its order that it intended to rely on its own "experience gained through previous area rate proceedings" in evaluating and resolving conflicts and disagreements in the various written submissions (Appx. B, pp. 43, 44, 46). The Commission subsequently denied an application for reconsideration of this order (Appx. B, p. 48).

Petitions pursuant to § 19(b) of the Natural Gas Act to review the Commission's basic July 15, 1971, Order Prescribing Procedure,

and its later orders denying reconsideration and cross-examination, were filed and consolidated in the Court of Appeals.[2]

In sustaining the Commission's novel and sweeping assertion of power to make rates through informal rulemaking on written submissions, drawing on its "expertise" and experience in other proceedings, the panel majority in the Court of Appeals first acknowledged that petitioners had presented a "clear-cut legal issue, alleged deprivation of procedural due process" (Appx. A, p. 9). It then proceeded to deny the petitions without discussing that constitutional issue. So far as the producers' objections under the Natural Gas Act and the Administrative Procedure Act were concerned, the court brushed aside and accorded no weight to the universal understanding of the Commission, natural gas pipelines and producers, and the courts for over thirty years after the enactment of the Natural Gas Act that the "full hearings" and "hearing" required for ratemaking actions under sections 4(e) and 5 of that Act refer to a hearing in which the parties not only are fully apprised of the evidence to be considered, but also have full and adequate opportunity to rebut that evidence and to test its accuracy, bias and meaning through cross-examination. Instead the two judges of the panel majority viewed the "encouragement which the Supreme Court gave to the FPC to innovate" and the Court's "comments concerning the need for streamlined procedures" in the recent *Permian Basin* decision (*Permian Basin Area Rate Cases* (1968) 390 U.S. 747) as "dispositive of the issues raised here" (Appx. A., pp. 13-15).

The dissenting judge in the Court of Appeals recognized that the question presented was not settled in *Permian Basin*, where

2. Certain producers initially petitioned for review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit; by virtue of the fact that petitions to review the same orders had been previously filed in the Court of Appeals for the Tenth Circuit, the District of Columbia Circuit Court of Appeals transferred the petitions before it to the Tenth Circuit, where all the petitions were consolidated.

the Commission had followed its historic practice by according the parties a full hearing with opportunity to test by cross-examination the complex factual determinations underlying the Commission's order. He was unwilling to dispense with the vital opportunity to test the bases for the Commission's order afforded by cross-examination; and he was equally concerned that the constitutional and statutory requirement for judicial review to determine whether the Commission's ratemaking order was supported by "substantial evidence" (Natural Gas Act of 1938, § 19(b), 52 Stat. 831, as amended, 15 U.S.C. § 717r(b)) in the record would be undercut by the Commission's suggestion that in setting rates it would rely, not only on the untested submittals in the present proceeding (as "composited" and "reconciled" by its staff), but on its "own experience" in unspecified other proceedings.

ARGUMENT

First: The Ratemaking Procedure Here Employed by the Commission, Denying the Right of Cross-Examination and Consequent Rebuttal, and Openly Promising the Commission's Use of Extra-Record Information, Violates the Minimal Requirements of Procedural Due Process Guaranteed by the Fourteenth Amendment.

The issue here is new, is one of mushrooming national importance, and urgently needs resolution by this Court.

Throughout practically the entire history of administrative regulation of commodities and services affected with a public interest, it has been accepted that the fixing of rates, though legislative in effect, must be based upon determinations of fact (see, *e.g., Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 300-302; *Morgan v. United States* (1936) 298 U.S. 468, 479-480; *Int. Com. Comm. v. Louis. & Nash. R. R.* (1913) 227 U.S. 88, 91-92). It is also universally recognized that rate proceedings attack the purveyors of the affected services "at a vital spot," since they depend on the ultimate rates for their livelihood (*Morgan v. United States*

(1938) 304 U.S. 1, 20). Consistently, therefore, this Court and other courts have held that, in respect of the factual determinations which are the heart of the ratefixing process,

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding" (*Int. Com. Comm. v. Louis. & Nash. R. R.* (1913) 227 U.S. 88, 93-94).

Thus it has been recognized that the factual bases for ratemaking, so long as there was any dispute about them, required an adjudicative hearing in order to accord procedural due process to the parties affected.[3] Rulemaking procedures were left to formulations of policy and the establishment of procedural rules and methods.

Administrative ratemaking stepped from an individual-company procedure to an area-wide procedure in the *Permian Basin Area Rate Cases* (1968) 390 U.S. 747. *Permian Basin* did not, however, depart from the tradition that the affected parties are entitled to a full hearing, including the testing of factual submissions by cross-examination, before the rates are set or refunds are prescribed. Throughout that proceeding the Commission complied with the procedural due process requirements of notice, hearing (including the presentation of evidence, cross-examina-

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3. *Morgan v. United States* (1938) 304 U.S. 1, 14, 18-19; *Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 300; *Morgan v. United States* (1936) 298 U.S. 468, 479-480; *West Ohio Gas Co. v. Comm'n* (No. 1) (1935) 294 U.S. 63, 69; cf. *Goldberg v. Kelly* (1970) 397 U.S. 254.

tion, and rebuttal), and a record of those matters so as to permit a full and intelligent review by a court of competent jurisdiction.

Thus *Permian Basin* did not involve any attempt to set rates pursuant to the foreshortened "rulemaking" procedure outlined in § 553 of the Administrative Procedure Act (5 U.S.C. § 553). Nor did any of the other area rate proceedings then pending in the Commission[4]; all were conducted with "adjudicative hearings" respecting the essential facts.

Now, however, in this case and in nationwide ratemaking proceedings now pending,[5] the Commission has leaped from that accepted practice to setting rates by "informal rulemaking," giving the affected parties no right of cross-examination, no right to explore on their own behalf the assumptions and methods being used in opposition to their views, no right even to know about any extra-record data that may be used by the Commission, and no effective right to meet and rebut such assumptions, methods and extra-record data. Their rights are limited to filing written data and argument and to filing written "comments" on the material filed by others.

In homespun terms, a party is allowed to say something, but he has no right to ask any questions or effectively challenge what others have said, or any other "information," "experience" or "expertise" that the Commission may purport to use and rely

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4. *Area Rate Proceeding (Southern Louisiana Area)* (1968) 40 F.P.C. 530, affirmed (5 Cir. 1970) 428 F.2d 407, certiorari denied (1970) 400 U.S. 950; *Area Rate Proceeding (Hugoton-Anadarko Area)* (1970) 44 F.P.C. 761, affirmed (9 Cir. 1972) 466 F.2d 974; *Area Rate Proceeding (Texas Gulf Coast Area)* (1971) 45 F.P.C. 674, appeal pending (D.C. Cir. No. 71-1828); *Area Rate Proceeding (Other Southwest Area)* (1971) 46 F.P.C. 900, enforced (5 Cir. June 8, 1973) CCH Utilities Law Rptr., Federal, New Matters, par. 11,423.

5. Notices of Proposed Rulemaking and Orders Prescribing Procedures, Docket No. R-389-B (April 11, 1973), 38 F.R. 10014-10016, and Docket No. R-478 (May 23, 1973) 38 F. R. 14295-14298. The Commission also employed informal rulemaking in setting just and reasonable rates in the Appalachian and Illinois Basin Areas, Order No. 411 (1970) 44 F.P.C. 1112.

upon. In short, there is no opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552).

Where the rates for the producers' product—the lifeblood of their businesses, investment and property—are thus being fixed, this procedure, we respectfully submit, goes over the brink of due process to administrative absolutism, the monster against which this Court warned in *Burlington Truck Lines v. United States* (1962) 371 U.S. 156, 167:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "

The Commission's asserted justification is twofold: that in *Permian Basin* this Court gave it the green light to use expeditious procedures, and that it now has acquired "experience" through five adjudicatory area rate proceedings and so knows how to go about getting the data it considers necessary. This latter is no more than if a trial judge were to say, "I have tried five murder cases, so in this sixth one before me I don't need any cross-examination; I can rely on my experience and what I found out in the others." And as for the former argument, expedition cannot excuse dispensing with due process (*e.g., Fuentes v. Shevin* (1972) 407 U.S. 67, 90 n. 22; *Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 305).[6]

As important as is the right of cross-examination to test the validity, completeness and meaning of the data, assumptions and

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6. This Court has required a meaningful hearing prior to the deprivation of any significant property interest except in the most "extraordinary situations" (*Boddie v. Connecticut* (1971) 401 U.S. 371, 379). Examples of such extraordinary circumstances are the setting of rents and prices as "wartime emergency" measures (*Yakus v. United States* (1944) 321 U.S. 414, 431, 436-437; *Bowles v. Willingham* (1944) 321 U.S. 503, 520).

methods which surface before the Commission, the right to be apprised of and to rebut the subsurface, extra-record data which the Commission's new "informal rulemaking" procedures leave it completely free to use is equally important.

In this proceeding and the nationwide ratemaking proceedings now pending, the Commission has acknowledged that it is setting rates by "informal rulemaking" procedures governed solely by section 553 (formerly section 4) of the Administrative Procedure Act.[7] Informal rulemaking proceedings under section 553 are *not* subject to the Act's "exclusive record for decision" requirement for more formal proceedings (A.P.A., § 556(e)). Instead, as all the judges in the Court of Appeals recognized, the Commission, under such informal procedure, is free to go outside the "record" in formulating its "rule" setting rates, as it has done in previous "informal rulemaking" proceedings in other contexts.[8] It is perhaps for this reason that the Commission has carefully refrained from stating in any of its orders in this proceeding that the *exclusive* record for its decision will be the written submittals of

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7. See Order on Reconsideration (September 7, 1971), Appx. B, pp. 40-41; Order Denying Motion for Cross-Examination (December 16, 1971), Appx. B, pp. 45-46; Notice of Proposed Rulemaking and Order Prescribing Procedures, Docket No. R-389-B (April 11, 1973), 38 F.R. 10014-10016.

8. *E.g., City of Chicago, Illinois v. Federal Power Commission* (D.C. App. 1971) 458 F.2d 731, 745-748, certiorari denied (1972) 405 U.S. 1074 (sustaining use of such data on assumption question would be open to full exploration in future area rate proceedings); see *California Citizens Band Association v. United States* (9 Cir. 1967) 375 F.2d 43, 54, certiorari denied (1967) 389 U.S. 844. The Attorney General's Manual on the Administrative Procedure Act (1947) is quite explicit on this point:

> "It is entirely clear, however, that section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings. Senate Hearings (1941) p. 444. Accordingly, except in formal rule making governed by sections 7 and 8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings" (*id.* at pp. 31-32).

the parties and the Commission's staff. In fact, in its order prescribing procedures for the impending national ratemaking, the Commission has candidly professed that one primary motivation for its sudden effort to fix rates by informal procedures was to enable it to "bring to bear data and expertise we had gained in related proceedings" upon its regulatory task.[9]

A "record" which omits what may be the most significant determinatives of the ultimate rates makes a mockery of the right of judicial review. Without such constraint,

> "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise" (*Baltimore & O. R. Co. v. Aberdeen & R. R. Co.* (1968) 393 U.S. 87, 92).

Permian Basin's approval of ratefixing in the natural gas industry on a group or area-wide basis, using composited or averaged data, does not magically transform these proceedings into purely "policy-making" proceedings depending wholly on "legislative" facts which may not appropriately or fruitfully be tested by cross-examination, or negate the fundamental due process needs of a hearing on the public record with cross-examination and adequate opportunity to question and rebut opposing views. Group ratemaking, while of recent origin so far as independent producers of natural gas are concerned, has long been employed in other industries[10] without the slightest suggestion that traditional ratefixing procedures were not required.

If the Commission is to have an adequate basis *in the record* for resolving ambiguities, deficiencies and conflicts in the various written submittals and for reaching its final rate determinations,

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9. Notice of Proposed Rulemaking and Order Prescribing Procedures, Docket No. R-389-B (April 11, 1973), 38 F.R. 10014, 10015.

10. *E.g., Acker v. United States* (1936) 298 U.S. 426; *Tagg Bros. v. United States* (1930) 280 U.S. 420; *New England Divisions Case* (1923) 261 U.S. 184 (division of joint rates).

the "inexorable safeguard" (*Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 304) of a full and fair hearing, including cross-examination and an all-inclusive record for decision, is essential.

In the present context of national "energy crisis," more than personalized constitutional protection is at stake. The problems to be solved are of national importance, concerning not only the viability of the gas producers, but the needs of the consumers and the national economy as well. In the nineteen years since the first *Phillips* decision[11] thrust the entire natural gas production industry under administrative regulation, this "managed economy" has seen the industry pass from overabundance to a gas shortage of crisis proportions. Dealing with this problem needs far more than the accumulation of raw data plus the application of self-acclaimed expertise and administrative mystique. It requires the most penetrating exploration of all available ideas and judgments, to determine whether the rates in contemplation are most likely to effectuate the overall purpose of generating an adequate supply at the least price, or to smother the enterprise it undertakes to regulate. Without a full hearing, testing and exploring on an open record every fact, idea and assumption by cross-examination and rebuttal, the agency forecloses access to the full and accurate information which is vital in the determination of issues of such vast importance.

Until now this Court has not been faced with this issue. The Commission in *Permian Basin* and its contemporaries raised no such problem, nor has any other case until the current spate of proceedings in rulemaking form which the Commission has now commenced, to culminate in national rate proceedings. The issue whether such a procedural form, with its denial of cross-examination, effective rebuttal and fully implemented record, comports with the requirements of due process, is squarely in issue here, and urgently requires resolution by this Court.

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11. *Phillips Petroleum Co. v. Wisconsin* (1954) 347 U.S. 672.

Second: Ratemaking by "Informal Rulemaking" Contradicts the History, Legislative Intent and Literal Words of the Natural Gas Act and Administrative Procedure Act in Necessary Conjunction.

The Administrative Procedure Act authorizes both "informal" rulemaking (§ 553) and "formal" rulemaking (§§ 553, 556 and 557). "Informal" rulemaking entails the right only to submit written data, views, or arguments (§ 553(c)). "Formal" rulemaking entails notice, hearing, participation by way of evidentiary showing, cross-examination and rebuttal, and an "exclusive" (i.e., all-inclusive) record for all purposes of decision and judicial review (§§ 553(b), 556(d), 556(e), 557(c)). On review of agency action pursuant to the formal rulemaking provisions, the reviewing court "shall * * * hold unlawful and set aside" agency action, findings, and conclusions found to be unsupported by substantial evidence "in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute" (§ 706(2)(E)).

"Formal" rulemaking must be used "when rules are required by statute to be made on the record after opportunity for an agency hearing" (§ 553(c)). Thus to determine whether a particular proceeding involves formal rulemaking procedures, the underlying agency statute governing the proceeding must be looked to. This, in the case at bar, is the Natural Gas Act.

The Commission's authority to change the rates to be charged by a natural gas company appears in §§ 4(e) and 5 of that Act (Natural Gas Act of 1938, §§ 4(e) and 5, 52 Stat. 822, 823, 15 U.S.C. §§ 717c(e) and 717d). These provisions authorize the Commission, after a hearing ("full hearings," as specified in § 4(e)), upon which it finds that any rate or charge is "unjust, unreasonable, * * *" to "determine the just and reasonable rate, charge * * *." What are "unjust and unreasonable" and "just and

reasonable" rates are mixed questions of fact, policy and judgment. The judgment and policy cannot exist in a vacuum; they exist only in relation to facts which must be first determined—basically an adjudicative process.

The Natural Gas Act requires, moreover, that "appropriate records" of the hearings under that statute "shall be kept" (*id.*, § 15(a), 52 Stat. 829, 15 U.S.C. 717n(a)); that any party may obtain a review of the Commission's order in the court of appeals; and that upon the filing of a petition for review the Commission shall file with the court "the record upon which the order complained of was entered" (*id.*, § 19(b), 52 Stat. 831, as amended, 15 U.S.C. 717r(b)). In such review, the Act provides that the findings of the Commission shall be conclusive "if supported by substantial evidence" (*ibid.*).

Thus where the necessary factual determinations are required by statute to be made after a "full hearing" and "hearing," with the "record upon which the order complained of was entered" required to be filed for review under a "substantial evidence" standard, it follows that the Natural Gas Act requires the determinations of just and reasonable rates to be "on the record." Then by literal application of the Administrative Procedure Act if ratemaking by rulemaking is the procedure adopted, it must be "formal" rulemaking pursuant to §§ 556 and 557, in accordance with the mandate of § 553(c).

The Administrative Procedure Act in no way limits the independent procedural requirements of the Natural Gas Act.[12] And on any view of the history of the Natural Gas Act, the "full hearings" and "hearing" required by §§ 4(e) and 5 of that Act mean a

12. "[These provisions] do not limit or repeal additional requirements imposed by statute or otherwise recognized by law" (5 U.S.C. § 559). This Court so recognized in *United States v. Florida East Coast R. Co.* (1973) 410 U.S. 224, 238.

formal hearing on the record, with right of cross-examination and of rebuttal of the matters which cross-examination brings to light.

Strong evidence that such is the continuing meaning and intention of the Natural Gas Act lies in the fact that that Act "was modelled on the provisions of the Transportation Act" (*Power Comm'n. v. Natural Gas Pipeline Co.* (1942) 315 U.S. 575, 584), which were in issue in *Int. Com. Comm. v. Louis. & Nash. R. R.* (1913) 227 U.S. 88, and which provide, as does § 4(e) of the Natural Gas Act, for a "full hearing" in setting rates. *Louisville*, it will be recalled (supra, p. 8), prescribed that such provision required that "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal * * * otherwise [a complete lack of supporting evidence] could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding" (227 U.S. at pp. 93-94).

Accordingly in *Natural Gas Pipeline*, this Court observed that:

> "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings. In this case, while the proceedings were not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case" (*Power Comm'n v. Natural Gas Pipeline Co.*, supra, 315 U.S. at pp. 583-584).

Until the Commission in the current cases (supra, p. 9) jumped to the use of informal rulemaking for area ratemaking

purposes—on the startling premise that *Permian Basin's* sanctioning of area ratemaking by formal rulemaking *with* full hearing was tantamount to sanctioning area ratemaking *without* full hearing—the administrative construction of the application of the Administrative Procedure Act to proceedings under the Natural Gas Act was specifically and positively to the contrary. The Attorney General's Manual on the Administrative Procedure Act (1947), prepared by the office most intimately connected with the development of that Act, states in no uncertain terms:

> "Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the 'record' developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court 'a transcript of the record upon which the order complained of was entered', and the Commission's findings of fact 'if supported by substantial evidence, shall be conclusive'. It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates 'on the record after opportunity for an agency hearing'. See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285)" (Attorney General's Manual on the Administrative Procedure Act (1947), p. 33).

This cogent reflection of the legislative history of the Act cannot be ignored or lightly brushed off, as the majority below has tried to do.[13]

United States v. Florida East Coast R. Co. (1973) 410 U.S. 224, is consistent with the foregoing analysis rather than contrary to it. Regarding the "on the record" requirement of the Administrative Procedure Act, the Court there held simply that "the language 'after hearing' of § 1(14)(a) [of the Interstate Commerce Act] *without more*"[14] could not be read as the equivalent of a requirement that the hearing additionally be held "on the record." However, the Court clearly held that the actual words "on the record after opportunity for agency hearing" are not words of art; other language having the same meaning is sufficient (410 U.S. at pp. 237-238). As already pointed out, the Natural Gas Act requires considerably more than a simple "hearing." Its provisions for "full hearings" and a "hearing," and for a substantial-evidence review upon "the record upon which the order complained of was entered" are clearly the full equivalent of language specifically requiring a rule to be made "on the record after opportunity for an agency hearing."[15]

Even apart from the provisions of the Administrative Procedure Act, *Florida East Coast* specifically recognized that the underlying

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13. The panel majority asserted in a passing footnote that the quoted interpretation of the Administrative Procedure Act "conflicts to some degree with the position taken by the Attorney General's office prior to passage of the A.P.A." (Appx. A, p. 17, n. 15). The material cited by the majority in support of its statement, however, conspicuously failed to support it.

14. 410 U.S. at p. 237; emphasis supplied.

15. Aside from the above, *Florida East Coast* is essentially different from the problem here. The "rule" challenged in that case was one which imposed a so-called incentive charge upon railroads when they used freight cars of other companies rather than acquiring more of their own to relieve the shortage. Unlike the factual determination of the just, reasonable, and nonconfiscatory rate which compensates the regulated owner of property (including independent producers of natural gas) for its service to the public, the agency action in *Florida East Coast* was a charge in the nature of a penalty to force nonowners of boxcars to return them to their owners rather than using them in substitution for purchasing their

statute specifically governing the agency proceedings—in this case the Natural Gas Act—may of its own force require formal proceedings. The Court there was confronted with the use of the unelaborated term "hearing" in conjunction with a grant of substantive authority enacted in 1966, well *after* the enactment of the Administrative Procedure Act in 1946, and presumably with that Act's alternatives in mind. Under those circumstances, in light of the varied meanings of the term "hearing" without more, as used in the Administrative Procedure Act, the Court was unwilling to infer a Congressional intent to require formal procedures from that language alone.

The present case is significantly different. The history of the Natural Gas Act previously outlined (in addition to its language) leaves no question that when Congress, in 1938, required "full hearings" and a "hearing" for the determination of just and reasonable rates under sections 4 and 5 of the Natural Gas Act, it meant that hearing which this Court in the *Louisville* case had held to be required—a hearing including a right to cross-examine witnesses and effectively to rebut opposing matters thereby brought to light, all conducted upon an all-inclusive record for decision.

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own. This was a clear rule of legislative policy, in which any compensation objective was of little, if any, significance. Accordingly, as the Court noted (410 U.S. at p. 242), the appellees there, unlike the petitioners here, "asserted no claim of constitutional deprivation," nor did the case logically present one.

Similarly, a recent order of the FPC involving rate procedures under the Natural Gas Act, affirmed by the Court of Appeals for the District of Columbia Circuit, *Mobil Oil Corporation v. Federal Power Commission* (D.C.App. 1972) 469 F.2d 130, certiorari denied (June 4, 1973) 41 U.S. Law Week 3637, did not involve the determination of just, reasonable and compensatory rates—as the Solicitor General himself pointed out in his brief in opposition to the petition for certiorari. Previously, in *Area Rate Proceeding (Southern Louisiana Area)* (1968) 40 F.P.C. 530, affirmed (5 Cir. 1970) 428 F.2d 407, certiorari denied (1970) 400 U.S. 950, the FPC, after full adjudicative hearing, had fixed the maximum just and reasonable rates for natural gas producers in the area, and had imposed a moratorium on rate increase filings. While the FPC in a further proceeding was considering new and higher area rate levels, by informal rulemaking it lifted the moratorium to the extent of permitting new rate filings up to a higher temporary ceiling, with such rates collectible subject to refund pending the final determination of new just and reasonable rate levels in the main proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)

Appendix A

January Term—February 20, 1973

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges

Nos. 71-1659, 71-1739, 72-1134, 72-1167
(Consolidated)

Phillips Petroleum Company, a Delaware corporation; Amerada Hess Corporation; Atlantic Richfield Company; Belco Petroleum Corporation; Beta Development Company; Chevron Oil Company, Western Division; Continental Oil Company; Gulf Oil Corporation; High Crest Oils, Inc.; Humble Oil & Refining Company; Marathon Oil Company; Skelly Oil Company; Sun Oil Company; Tenneco Oil Company; Texaco Inc.; and Union Oil Company of California,
Petitioners,

v.

Federal Power Commission,
Respondent.

The State of New Mexico; Four Corners Gas Producers Association; United Distribution Companies; El Paso Natural Gas Company; Pubco Petroleum Corporation; Southern California Gas Company; Aztec Oil & Gas Company; Shell Oil Company,
Intervenors.

This cause came on to be heard on petition for review of an order of the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered that the petition for review should be and the same is hereby denied. Seth, Circuit Judge, dissenting.

"A true copy
Teste
HOWARD K. PHILLIPS
Clerk, U.S. Court of Appeals,
Tenth Circuit
By /s/ Lavon M. Irlbeck
Deputy Clerk"

HOWARD K. PHILLIPS
Clerk
By /s/ LAVON M. IRLBECK,
Lavon M. Irlbeck
Deputy Clerk

Appendix A
United States Court of Appeals,
Tenth Circuit.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation, et al.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

The State of New Mexico,
Intervenors.

Nos. 71-1659, 71-1739, 72-1134 and 72-1167
Argued and Submitted July 12, 1972.

Decided Feb. 20, 1973.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

The Phillips Petroleum Company, together with the several intervenors, all independent producers of natural gas in the Rocky Mountain area, seek review of an order of the Federal Power Commission promulgating a rulemaking procedure for the fixing of rates of natural gas sales in interstate commerce pursuant to the Natural Gas Act, 15 U.S.C. § 717 and, particularly, §§ 4 and 5 of the Act, 15 U.S.C. §§ 717c and 717d, which grants the Commission the authority to establish "just and reasonable rates."

The peculiar aspect of this case is that the Commission has drastically changed the procedure from the traditional method involving trial-type adjudicatory proceedings to this rulemaking

method. This is an informal hearing which is not conducted on the record and which does not afford an opportunity for cross-examination. It is used so as to enable the Commission to establish area rates without having an individual hearing on each producer. It calls for composition and reconciliation of written submissions of the various producers. The validity of this procedure is the issue which is presented to us.

I.

HISTORY OF THE CONTROVERSY

The Commission's authority to regulate interstate sales of natural gas derives from the Natural Gas Act of 1938 which declares that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." 15 U.S.C. § 717(a). The Commission is empowered to set aside and modify any rate or contract which it determines after hearing to be "unjust, unreasonable, unduly discriminatory or preferential."

A brief history of some of the antecedent events is necessary. In 1954 the Supreme Court decided in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), that independent producers of natural gas are natural gas companies within the meaning of § 2(6) of the Act. From this time forward, the Commission has "labored with obvious difficulty to regulate a diverse and growing industry under the terms of an ill-suited statute." *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 756, 88 S.Ct. 1344, 1354, 20 L.Ed.2d 312 (1968).

Following the *Phillips* decision, the Commission undertook the regulation of rates of approximately 2,500 producers selling gas in interstate commerce and did so on a company-by-company basis. The result of all this was somewhat ineffectual. *See* Permian Basin, *supra,* at 757 n. 13, 88 S.Ct. 1344. Thus in 1960 the Com-

mission undertook to regulate producers on an area basis, whereby a uniform ceiling price applicable to all producers would be established based upon producers' actual costs, area data for the flowing gas costs and national data for new gas-well costs. *See* Phillips Petroleum Co., 24 FPC 537, 540 (1960), aff'd sub nom. Wisconsin v. FPC, 112 U.S.App.D.C. 369, 303 F.2d 380 (1961), aff'd, 373 U.S. 294, 83 S.Ct. 1266, 10 L.Ed.2d 357 (1963). The Commission spent five years with its first area rate case which involved the establishing of rates for the Permian Basin. *See* Permian Basin Area Rate Proceeding, 34 FPC 159 (1965). This case was reviewed by the Supreme Court and the area rate procedure was affirmed. In re Permian Basin Area Rate Cases, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).

As a result of the approval given in the *Permian Basin* case, the Commission instituted a number of other similar proceedings.[1] These proceedings were lengthy and cumbersome, and as a result of this experience the Commission undoubtedly considered some of the admonitions given in the *Permian Basin* opinion which included: the Commission should "continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders;"[2] *Permian* is "the first of many steps toward a more expeditious and effective system of regulation."[3] Based on these statements and the ruling in the *Permian* case, the Commission issued a notice of proposed rule-making which called for the issuance of rules fixing just and

1. *E. g.*, Southern Louisiana Area Rate Proceeding, 40 FPC 530 (1968), aff'd, 428 F.2d 407 (5th Cir.), cert. denied sub nom. Municipal Distributors Group v. FPC, 400 U.S. 950, 91 S.Ct. 241, 27 L.Ed.2d 257 (1970); Hugoton-Anadarko Area Rate Proceeding, 44 FPC 761 (1970), affirmed, 466 F.2d 974 (9th Cir. 1972); Texas Gulf Coast Area Rate Proceeding, 45 FPC—(May 6, 1971), appeal pending, D.C.Cir., No. 71-1828; Other Southwest Area Rate Proceeding, 46 FPC—(October 29, 1971), appeal pending, 5th Cir., No. 72-1114.

2. Permian Basin Area Rate Cases, *supra*, at 816 n. 99, 88 S.Ct. at 1385.

3. *Id.* at 772 n. 37, 88 S.Ct. at 1362.

reasonable rates for independent producers in the Appalachian and Illinois Basin Area.[4] In less than a year after its notice rates were prescribed for these areas.[5]

The next step was for the Commission to embark on a nationwide rulemaking proceeding, whereby it sought information on independent producers' costs of exploring and developing natural gas, gas supply, rate of return and general revenue requirements and prices for new gas sales. 35 Fed.Reg. 11638 (1970). Public hearings of record were held and arguments were heard concerning the Commission's attempt to promulgate rates through a rulemaking procedure. *See* 36 Fed.Reg. 13585 (1971). *See also* Order No. 435 which established some rates under § 7 of the Gas Act. This case is currently on appeal, American Public Gas Ass'n v. FPC, D.C.Cir., No. 71-1812.

This led to the issuing of notice of proposed rulemaking and order procedures for the Rocky Mountain area. 36 Fed.Reg. 13621 (1971). This notice provided that just and reasonable rates would be issued for gas contracts dated before October 1, 1968. It provided also for determination as to whether the rates under Order

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4. 34 Fed.Reg. 17341 (1969).

5. 44 FPC 1112 (1970). Although several parties challenged the Commission's use of its rulemaking authority to establish rates, the Commission cited American Airlines, Inc. v. CAB, 123 U.S.App.D.C. 310, 359 F.2d 624, cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1969), and stated that no party demonstrated a need for a formal, evidentiary hearing. 44 FPC at 1119. No party appealed the Commission's order. The Commission had further noted that

> our action here is not one based on a nugatory record. We fully considered the staff report, and accepted it as evidence. We received lengthy and well-considered comments from many parties, and answers to said comments made by other parties. And, we considered the staff's minutes of the conference of June 2, 1970, and the comments of such minutes filed by Cities Service on July 24, 1970. Added to our consideration of all of this rather extensive record, we have applied the expertise gained by us in determining previous area rate proceedings, and our long experience gained from dealing with the problems of these areas.

44 FPC at 1119.

435 were to apply to contracts dated between October 1, 1968 and June 17, 1970. Except for these specifics contained in the notice, the rulemaking proceedings in Docket No. R-389A continued in effect. It was thus clear that informal rulemaking was being employed since the order outlined the manner in which data was to be submitted and provided that the Commission's staff would composite and reconcile such data. It named the petitioners herein together with the purchasing pipelines. It allowed other persons to become parties by filing a notice of intention to respond by August 2, 1971.

The petitioners challenged the new rulemaking procedures. These challenges were, however, unsuccessful before the Commission. Motions for rehearing and for reconsideration were made in which the present contentions as to the necessity for evidentiary hearings were made. The Commission rejected the contention that an adjudicatory hearing was required, stating that both the Natural Gas Act and the Administrative Procedure Act recognized the use of rulemaking procedures by notice to interested parties and the opportunity to submit written material.[6]

The Phillips Petroleum Company then filed its petition seeking review in this court. Amerada Hess Corporation on behalf of itself and others filed a petition for review in the Court of Appeals

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6. The Commission stated that there was nothing in the Natural Gas Act that required a "hearing on the record" or an adjudicatory hearing. As to the Administrative Procedure Act, the Commission said that even if § 7, 5 U.S.C. § 556, were applicable,

> we cannot determine how Amerada has been, or will be, prejudiced by the adoption of the procedures in Docket No. R-425. Amerada has not pointed to specifics on which it needs to cross-examine or present live rebuttal testimony. Instead, Amerada refers to general subjects to which it, and other interested parties have filed written submissions, and states as reasons for its requests, "apparent disputes." . . . The existence of disagreements among the several submissions does not preclude the Commission from making a reasonable determination in light of the record before it and based on its own experience.

for the District of Columbia. This petition was transferred and consolidated with the Phillips case for the purposes of this review.

The matter submitted for review herein is "Notice Instituting Proposed Rulemaking and Order Prescribing Procedure", which document was, as previously noted, issued by the Commission on July 15, 1971 in Docket No. R–425. This was called by the Commission a rulemaking procedure having the purpose of more quickly effectuating the Commission's task of fixing just and reasonable rates. The Commission ordered:

> (1) completion by petitioners and pipelines producing natural gas of questionnaires covering "flowing gas costs and operational data on an individual company 1969 test year basis."
>
> (2) composition of such data by the Commission's staff before October 22, 1971, the results being available to any party on request.
>
> (3) verified written responses to the proposed rulemaking before November 12, 1971.
>
> (4) a conference on August 3, 1971, for "developing the issues and procedures to be followed" in the proceeding, as such "appears to be warranted in the public interest."

No specific rates were set forth in the notice or release.

It is noteworthy that the Commission has initiated the procedure for setting area rates and by doing so it was engaging in a rulemaking proceeding. However, its notice or release also formulated a procedure to be used in the area rate proceeding. This is also a rulemaking proceeding. Thus the question on the merits which we are called on to review is the validity of the proposed procedure of the Commission which in effect abolishes the traditional trial-type hearing and substitutes for it the informal evaluation of written submissions.

II.

JURISDICTION TO REVIEW

Petitioners assert that there is jurisdiction pursuant to § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The Commission does not deny this, for they are equally desirous of having a determination of the validity of the proposed procedure. Hence, the Commission takes the position that the orders entered are final and that the attempted review is not a premature effort. This court is obligated, however, to view the condition and determine for itself that there is jurisdiction to determine the case. *See* Sunray DX Oil Co. v. FPC, 351 F.2d 395, 397 (10th Cir. 1965).

In the proposed rulemaking procedure, specific rates, terms or conditions are not set forth. It is a rule which prescribes standards for the setting of area rates in the Rocky Mountain region and to that end it orders submission of certain data. Thus it is clear that the Commission is presently engaged in an exercise of its rulemaking power, even though it is merely formulating the procedure to be used.

The matter before us is a question of law and not of fact. However, it is procedural in its nature, even though it may have profound substantive effects, and we are mindful that mere procedural orders have been held to be not within the scope of the circuit courts of appeal. *See* FPC v. Metropolitan Edison Co., 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408 (1938). But this line of cases goes to the proposition that courts will not *interfere* with the administrative process and will limit themselves to review of an actual order following a hearing. *See* FPC v. Metropolitan Edison Co., *supra*; Amerada Petroleum Corp. v. FPC, 285 F.2d 737 (10th Cir. 1960); United Gas Pipe Line Co. v. FPC, 206 F.2d 842 (3d Cir. 1953); Eastern Utilities Associates v. SEC, 162 F.2d 385 (1st Cir. 1947). If the order is as bad as the petitioners claim, it would require a holding that there exists a denial of rights guaranteed by the due process clause of the Fifth Amendment and

a holding also that the Commission is acting beyond the law and outside the Administrative Procedure Act as well. Violations of this magnitude would render the entire proceeding invalid, and it could be raised following the setting of rates, but there would be much wasted motion in proceeding in this manner.

The statute in question, § 19(b), provides for judicial review of final agency orders and under such a statute challenges to newly promulgated agency regulations prior to their application against particular individuals have often been entertained. *See* FCC v. ABC, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954); Columbia Broadcasting System v. United States, 316 U.S. 407, 425, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942); Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In the latter three cases Mr. Justice Harlan, writing for the Court, mentioned two applicable criteria: first, whether the issues tendered are appropriate for judicial resolution, that is to say e. g., whether specific facts were needed in order to decide the case and, secondly, whether the impact on the parties is substantial. In one of the food, drug and cosmetic act cases, Toilet Goods Ass'n v. Gardner, *supra,* it was determined that a question existed as to whether the threatened inspection would ever materialize. In the other two cases, Abbott Laboratories v. Gardner, *supra,* and Gardner v. Toilet Goods Ass'n, *supra,* it was held that a pre-enforcement judicial review was justified because the questions were straightforward legal ones not depending on specific facts and, secondly, that the regulations had an immediate substantial impact on the manufacturers involving large expenditures and the risk of serious penalties.

In our case the petitioners present a clear-cut legal issue, alleged deprivation of procedural due process, and it could not be made any clearer by factual background. Furthermore, the impact is

immediate and the cost of its application, if it proves to be invalid, is substantial. The delay which would result from remanding this case for full-scale procedure would be great and unquestionably injury would result to the petitioners and would be felt by the public at large. The words of Chief Justice Stone in Columbia Broadcasting System v. United States, 316 U.S. 407, 425, 62 S.Ct. 1194, 1204, 86 L.Ed. 1563 (1942), come to mind:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

Accordingly, we view the present order as one which is appropriate for judicial review and resolution since it tenders a pure question of law and, secondly, the hardship to the petitioners which would result from refusal to review the question would be of great magnitude, and we conclude that the case is a proper one for the exercise of this court's jurisdiction.

III.

VALIDITY OF THE PROPOSED REGULATION BY RULE-MAKING UNDER THE NATURAL GAS ACT

The Act does not expressly authorize the procedure which the Commission has adopted; by the same token, the Act does not prohibit it. Section 5 of the Act gives the Commission the power to fix just and reasonable rates. It does require that a hearing shall be held, and the rules of procedure regarding hearings are found in § 15 of the Act, 15 U.S.C. § 717n. Part (b) of this particular section provides that

> [a]ll *hearings*, investigations, and proceedings . . . *shall be governed by rules* of practice and procedure to be *adopted by*

> *the Commission,* and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter. (Emphasis added.)

The Commission, acting pursuant to § 16 of the Act, 15 U.S.C. § 717*o*, issued a rule which provides, as we have seen, for an informal hearing. This would appear to be in conformity with the plain terms of § 15 quoted above.

Section 16 is entirely consistent with the particular order adopted. It provides the Commission with the "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate. This provision goes on to say, referring to the Commission, that it "may prescribe the form or forms of all statements, declarations, applications, and reports to be filed." This section thus provides the Commission with a broad authority in prescribing procedures for obtaining information upon which it is to act. As was said by the Court of Appeals for the District of Columbia, a primary objective is the obtaining of information to enable the Commission to carry out effectively the provisions of the Natural Gas Act. The court went on to say that the Commission has the ability to choose with relative freedom the procedure that it will use to acquire relevant information. The Commission has the power to tailor its proceedings so as to fit the issues before it together with the information that it needs to illuminate those issues and the manner of presentation which will bring before it the information in the most efficient manner. *See* City of Chicago v. F.P.C., 147 U.S.App. D.C. 312, 458 F.2d 731, 743-744 (1971).

After reading §§ 15 and 16, one is constrained to conclude that the Commission has a very broad discretion indeed in determining the form of its proceedings. The petitioners, on the other hand,

maintain that § 5 of the Act in providing for a hearing, necessarily means a formal or adjudicative type of hearing with full right of cross-examination and participation in the preparation of a public record, a record which must be the product of the ratemaking procedure. This, so it is argued, is the method which has been followed throughout the years and the present attempts at innovations are not authorized by the statute.

It is true that the Commission has traditionally conducted individual company-by-company hearings. *See, e. g.,* FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942), which upheld the procedures under the Natural Gas Act and endorsed the adjudicative formal-type hearing. However, the Court in that instance did not consider the nature of the proceedings required under the law. It merely stated that a prerequisite to a rate order is a hearing and findings. In that case the companies had full opportunity to cross-examine witnesses and although the Supreme Court approved the proceeding as a fair hearing, it did not establish that a formal hearing is necessary in order to comply with the Gas Act or the Constitution.

The petitioners also rely on other regulatory statutes and seek to argue that in order to have a fair hearing it must be a formal proceeding.[7] However, we cannot justifiably apply standards which have been laid down in quasi-judicial proceedings.

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7. Petitioners place reliance on Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936) and its successor, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129 (1938). There the Supreme Court reversed a decision establishing rates under section 310 of the Packers & Stockyards Act of 1921, 7 U.S.C. § 211, because the administrative official making the decision did not hear the evidence, 298 U.S. at 478-479, 481-482, 56 S.Ct. 906, a situation not occurring in the case at bar. Moreover, the *Morgan* proceeding was characterized as quasi-judicial, 304 U.S. at 14, 58 S.Ct. 999, whereas area rate proceedings are quasi-legislative. Finally, it was stated that "full hearing" embraced the right to present evidence and the opportunity to know the claims of opposing parties. *Id.* at 18-21, 58 S.Ct. 999. Petitioners had this right and opportunity.

Petitioners also misplace reliance on I.C.C. v. Louisville & Nashville R.R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913). Not only does

Decisions of the Supreme Court since the rulings in the *Phillips* cases have pointed the way to adoption of a more flexible and less formal method for fixing the rates of gas producers. Its first effort was area rate setting, itself a departure from the adjudication process. The Supreme Court approved this early effort in FPC v. Texaco, Inc., 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed. 112 (1964), a pre-*Perminan Basin* case. The Court, though dealing with § 7 of the Gas Act, held that

> the statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived. . . . To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. . . . We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled.[8]

The decision of the Supreme Court which we regard as dispositive of the issues raised here is In re Permian Basin Area Rate Cases, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed2d 312 (1968). In that area rate decision Mr. Justice Harlan, writing for the Court, described in detail the difficulties experienced by the Commission in seeking to regulate the producers' sales. It was described as the "outstanding example in the federal government of the breakdown of the administrative process," citing Landis, Report on Regulatory Agencies to the President-Elect.

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that case deal with the Interstate Commerce Act, but it is also a pre-Administrative Procedure Act case which is fully out of harmony with that statute.

8. FPC v. Texaco, Inc., *supra*, 377 U.S. at 39, 44, 84 S.Ct. at 1109, 1112. *See* Davis, Administrative Law Treatise § 7.01, at 153-54.

In the *Permian Basin* case the Supreme Court, utilizing the price regulation analogy, stated that the Constitution does not prohibit the determination of rates through group or class proceedings and that it does not require that the separate financial position of each member of the class be evaluated. Indeed, the only limitation noted was that the prices fixed must be calculated in conformity with the constitutional limitations; that such prices must not be arbitrary, discriminatory or irrelevant to the policy which the legislature had agreed to adopt.

As we view it, the present effort is, to a large degree, the result of the encouragement which the Supreme Court gave to the FPC to innovate. Thus in the *Permian* case the Court stated that "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."[9] This message was many times repeated: "the width of administrative authority must be measured in part by the purpose for which it was conferred";[10] "the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods";[11] "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances";[12] "[p]rovided only that they do not together produce arbitrary or unreasonable consequences, the Commission may employ any 'formula or combination of formulas' it wishes, and is free 'to make the pragmatic adjustments which may be called for by particular circumstances.' "[13]

The final contention of the petitioners is that there can be a valid judicial review only if there is a record. However, we do

9. 390 U.S. at 790, 88 S.Ct. at 1372.
10. *Id.* at 776, 88 S.Ct. at 1364.
11. *Id.* at 777, 88 S.Ct. at 1365.
12. *Id.* at 784, 88 S.Ct. at 1369.
13. *Id.* at 800, 88 S.Ct. at 1377.

not agree that this requires that there be a record resulting from a formal evidentiary hearing. The important point is that there shall be a record which will allow an orderly review of the Commission's findings and conclusions. Under the rule the record will consist of the written comments submitted by the respondents to the Commission together with questionnaire data filed by producer and pipeline companies and composited by the Commission staff. The submissions of the petitioners would be placed in public files and made available for public inspection. Thus the petitioners are aware of the material which will be considered together with the application of Commission expertise to the information submitted.

Finally, the reviewing court is at liberty to remand the cause to the agency for further delineation, information or expression of views.

In the light of the provisions of the Act, together with the Supreme Court's comments concerning the need for streamlined procedures, we are of the opinion that the proposed rulemaking is consistent with the Natural Gas Act and is valid.

IV.

THE CONTENTION THAT THE ADMINISTRATIVE PROCEDURE ACT REQUIRES FORMAL PROCEEDINGS

Petitioners read the Administrative Procedure Act (APA) as requiring a formal hearing whenever a hearing is called for in a particular type of proceeding. The Commission, on the other hand, contends that the key to the requirement of a formal hearing is the term "hearing on the record."[14]

The APA expressly provides for two categories of administrative hearing and decision: rulemaking and adjudication. The term

14. They cite in support of their argument the following cases: United States v. Allegheny-Ludlum Steel Co., 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972); Siegel v. AEC, 130 U.S.App.D.C. 307, 400 F.2d 778, 785 (1968); Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965).

"rule" in § 2, 5 U.S.C. § 551(4), includes the approval or prescription of future rates. Unquestionably, therefore, the hearing required by the Gas Act fixing rates is a rulemaking procedure rather than adjudication.

Two types of rulemaking are recognized under § 4. Informal is that generally used, and § 4 prescribes the procedure in connection with informal rulemaking such as proper notice so that interested persons are given an opportunity to participate "through submission of written data, views, or arguments with or without oral presentation"; the rules adopted must incorporate a statement as to their basis and purpose. Formal rulemaking is the exception which is set forth in § 4(b) which provides:

> When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The § 4(b) exception calls for the procedural formalities that are found in adjudication including the right to submit oral evidence and to cross-examine. This approach is a hybrid one which is in part rulemaking and in part adjudication.

The fact, as previously noted, that the Gas Act does not contain the words "on the record" furnishes a strong argument in support of the Commission's contention that informal rulemaking satisfies the requirements of the APA. If the words "on the record" were contained in the Gas Act, it would furnish a basis for the petitioner's position. *See* 2 Davis, Administrative Law Treatise § 13.08, at 225 (1958). Professor Davis states that the large number of administrative statutes do not contain the words "hearing on the record." However, there are indications that the presence or absence of these words is not conclusive. *See* H.R.Rep.No. 1980, 79th Cong., 2d Sess. 51, n. 9 (1946); Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950). A more reliable test is the congressional intent as contained in the

specific statute. *See* United States v. Allegheny-Ludlum Steel Co., 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972).

The scope and depth of the § 4(b) exception are not apparent from a reading of the Committee reports and the debates. Moreover, a study of the research materials such as the Final Report of the Attorney General's Committee, the Committee Monograph on the FPC and the Attorney General's Manual on the Administrative Procedure Act do not, with the exception of the Attorney General's Manual, contain any significant evidence which would indicate a congressional intent to require formal rulemaking procedures.

Comments in the Attorney General's Manual at page 33 take for granted that rate setting hearings under the Gas Act will be on the record and thus will be formal and adjudicative. These comments are, however, not to be regarded as evidencing congressional intent because the Manual is not addressed to Congress but rather to various administrative agencies after the passage of the Administrative Procedure Act, and so this is at best very weak support for the petitioners' contentions.[15]

Accordingly, from the legislative history of the Administrative Procedure Act, it must be concluded that Congress intended to allow administrative agencies a broad latitude in adopting rulemaking procedures. Throughout this period the FPC had been conducting experiments with various procedures, especially in the area of proof and evidence, and the Attorney General's Committee recommended further experimenting. Congress sanctioned such procedural experimentation in the APA.

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15. The interpretation of § 4(b) contained in the Manual conflicts to some degree with the position taken by the Attorney General's office prior to passage of the APA. The Attorney General's Committee specifically found in its Monograph on the Federal Power Commission that formal rulemaking had proved unsatisfactory for rate setting and was not likely to be used in the future. Sen.Doc.No.10, 77th Cong., 1st Sess. pt. 12, at 40 (1941). The Final Report of the Attorney General's Committee also suggests that rate setting will not be restricted to formal, adjudicatory proceedings. Sen.Doc.No.8, 77th Cong., 1st Sess. 106-11 (1941).

As we have seen the present proposed rulemaking stems from the suggestions of the Supreme Court in the *Permian Basin* case. There is no assurance, however, that this will be successful and the procedures may have to be modified or discontinued. But such flexibility was within the contemplation of the Congress when it enacted the APA, especially, where as here, formal rulemaking procedures are not required.

Finally, as we have noted earlier, the hearings here involve quasi-legislative rather than quasi-judicial activities. Where this is the situation, informal proceedings are generally held to be sufficient. *See* Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933); I. C. C. v. Louisville & Nashville R. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913) (dictum).

In summary, we are of the opinion that the proposed rulemaking is in harmony with the comments of the Supreme Court contained in *Permian Basin* and in harmony also with the Natural Gas Act and the APA. The gas producers' contrary argument is largely based on the FPC's history of conducting adjudicatory hearings. Based on this history, the gas producers would seek to have the court impose a requirement that its hearings be conducted in this manner. We are convinced that such action would be unwarranted.

The petition for review should be and the same is hereby denied.

SETH, Circuit Judge (dissenting):

I must dissent from the majority opinion filed herein as to the procedure required to be followed by the Federal Power Commission. It does not appear that the issue has been settled by the Permian Basin Area Rate Case, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312, as the opinion states. Also the specific method here sought to be used by the FPC as evidenced by its rulings and

orders in this record has not been considered in reference to the doctrine of confiscation which provides the constitutional base for court review of proceedings of this nature. The specifics of ratemaking include the resolution of disputed facts and a consideration of the constitutional problems attendant to the fixing of just and reasonable rates.

The issue is the method of setting rates for the gas producers, and although the Supreme Court has indicated that some substantial departures from traditional methods are permitted, the complete conversion to rulemaking under the orders here concerned does not appear warranted under existing decisions. I am not prepared to anticipate a further departure in view of the constitutional limitations.

Some further examination of the decisions appears to be necessary before considering some practical problems of the record, the required review by the courts, and some specific matters relative to the method here sought to be used by the FPC.

In F. P. C. v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037, the Court considered the ratemaking function of the FPC under section 5 of the Natural Gas Act. The Commission then was proceeding under the typical return on "investment" ratemaking doctrines. However, the Court described at some length the function of the courts and the nature of judicial review under the Natural Gas Act, and stated: "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped." It is this determination by the courts that is frustrated by the procedure here adopted by the FPC.

The Supreme Court, prior to F. P. C. v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037, had decided Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (see also 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129). One

of the principal issues there raised and considered by the Court was the nature of the hearing required to be held under the Packers and Stockyards Act [7 U.S.C. §§ 181-229]. The Court there held it was quasi-judicial and that a "full hearing" was required and said: "Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order." This is a clear and direct reference to the procedure and to nothing else.

There have been several decisions by the United States Courts of Appeals which directly concerned summary proceedings under the Natural Gas Act. Some of these are based on the Act and some on due process. One of the earlier of these cases is Mississippi River Fuel Corp. v. F. P. C., 202 F.2d 899 (3d Cir.), where the court did not permit a summary refusal by the FPC to receive a rate schedule tendered under section 4. Later in Shell Oil Co. v. F. P. C., 334 F.2d 1002 (3d Cir.), the same court held that those objecting to filings under section 4 should have an opportunity to be heard and there be a "full hearing." See also Hill v. F. P. C., 335 F.2d 355 (5th Cir.). In Murphy Oil Corp. v. F. P. C., 431 F.2d 805 (8th Cir.), the court considered FPC action on a rate application without a hearing. The Commission had sought to handle the issue under section 16 of the Natural Gas Act, but the court held that a "hearing" was required, which was understood to mean a formal hearing. The court in American Louisiana Pipe Line Co. v. F. P. C., 120 U.S.App.D.C. 140, 344 F.2d 525, held an evidentiary record was required with a decision based upon the facts so developed and not upon the regulatory experience of the agency.

F. P. C. v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037, must be regarded as a significant case as to the issues before us. It is apparent that the nature of the proof

required and the method of the Commission is now much different in the area rate cases such as the Permian Basin Area Rate Cases, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312, but this should not bring about a different result as to the fundamental nature of the hearings. The practices of the Commission have changed during the many years it has been in existence, but a present feeling of urgency, as indicated in the Commission's brief, should not overcome the statutory or constitutional requirements for a full hearing.

The FPC here relies on Hunt Oil Co. v. F. P. C., 424 F.2d 982 (5th Cir.), which is important, but is cited principally for the statement in it that area rate proceedings are quasi-legislative and thus not quasi-judicial. This is useful as a generality, but it does not assist us much in our problem.

The relation of the Administrative Procedure Act to the Natural Gas Act provisions has been elsewhere considered in detail and need not be repeated here other than to state the conclusion that even if the Natural Gas Act does not expressly require a full evidentiary hearing, it does require a "hearing on the record," and thus if the Administrative Procedure Act is operative, a hearing to meet its requirements set out in 5 U.S.C. §§ 556 and 557 is necessary.

On the requirements of the Administrative Procedure Act as to rulemaking by the ICC, the Supreme Court has recently decided United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453. This treats the application of 5 U.S.C. §§ 556 and 557 (the APA) when *rules* are required to be "on the record." The Court there said:

> "Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), and Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 57

S.Ct. 724, 81 L.Ed. 1093 (1937); and because 49 U.S.C. § 1(14)(a) does not require a determination 'on the record' the provisions of 5 U.S.C. §§ 556, 557, were inapplicable."

The above decision is significant here, but as the quotation indicates the Esch Act gives specifically to the ICC the authority to make "rules, regulations, and practices with respect to car service." With this specific authority for rules for the limited subject before it in an Act which applies only to the ICC and its powers, it is not difficult to see how authority was found for the rulemaking type of hearing under the APA without use of sections 556 and 557.

The Supreme Court then in United States v. Florida East Coast Ry., ... U.S. ....., 93 S.Ct. 810, 35 L.Ed.2d 223, considered essentially the same issue as in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453. Again it is a matter arising under the Esch Act with its limited scope of car service rules and with specific authority for rules relating to the subject. The Court there holds that evidentiary hearings are not required under the Esch Act with reference to the imposition of charges on carriers using cars of others. It also holds that the term, "hearing," in section 1(14)(a) of the Interstate Commerce Act is not the equivalent to "on the record after opportunity for an agency hearing," as used in section 553(c) of the Administrative Procedure Act. The Court also notes however that sections 556 and 557 of the APA could be "triggered" by other language. The opinion in Florida East Coast is in the narrow statutory area of "car rules," but makes a general distinction between "rulemaking type proceedings" and "a proceeding devoted to the adjudication of particular disputed facts." The Court distinguishes the Morgan case on the basis of notice to the parties. Attention is also directed in Florida East Coast to the distinction in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372, between disputed facts and general rules.

It would appear also that the hearing provisions in the Federal Power Act plus the contemplated review should "trigger" the provisions of sections 556 and 557 of the Administrative Procedure Act, and the exceptions in section 553 apply because this is certainly not a matter of general policy rules. We have before us an example of the need to resolve disputed facts under the distinction made in Florida East Coast in a traditional ratemaking situation. The Commission has expressly here stated in its Order of December 16, 1971, that it would decide these disputed facts "in the light of the record before it and based on its own experience." The decision is thus to be made on these two factors even without the benefit of an evidentiary hearing. Although Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, may be weakened by the way in which it was distinguished in Florida East Coast, it still must stand for the proposition in the following quotation from the opinion relative to the reasons for an evidentiary hearing:

> ". . . The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

See also I. C. C. v. Louisville & Nashville R. R., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431.

By order of the FPC which instituted the rulemaking procedure, certain producers were named therein and made parties whether they wanted to be or not. Furthermore, they were "ordered and directed" to complete, "verify," and file certain cost data within a specified time. The proceedings were directed to them specifically. Statements and "submittals" were required to be under oath. This

procedure has to be unusual in a rulemaking proceeding where generally those interested may submit information if they wish. However, as to those named they are "hereby made respondents to this rulemaking proceeding," and then ordered to respond. Thus it commences with all the compulsion used at any rate-making hearing, but then provides for "submittals" and "responses" and "statements" which the staff "shall composite and reconcile." After this, the Commission will "consider" the material and reach a decision, but from the record and brief references it also expects to rely on its "expertise" and the files which have been accumulated from the nationwide "hearings" previously conducted and from other sources. As indicated the FPC in its Order Denying Motion for Cross-Examination in Docket R-425, issued December 16, 1971, said:

> "In a rulemaking proceeding, such as the instant one, our primary objective is the acquisition of information which will enable us, *inter alia,* to determine just and reasonable producer rates for jurisdictional sales in the Rocky Mountain area for contracts dated prior to October 1, 1968. The purpose is not to allow interested parties to define the issues or narrow the scope of the proceedings. On the contrary, in soliciting comments from interested parties, and in relying upon the experience gained through previous area rate proceedings, we are building a record from which we can make a determination of said producer rates. We need not, as Amerada would require us to do, lose ourselves in an excursion into detail which would obscure, rather than clarify, the issues before us."

The above quotation in the first sentence states that only one of the purposes of the hearing is to determine just and reasonable rates. If this is only one of the purposes and since "comments" are also "solicited" from other interested parties, and experience from other hearings is used, it is difficult to determine what "the record" of the "hearing" will be. It is also apparent that those

ordered to be made parties will have no part in the making of the record of the proceedings, that is, through the introduction of exhibits or testimony with the right to object to or test the validity of the material. There is thus assembled material which cannot be considered a "public record," and which is not really *identifiable* as having been assembled during the course of public proceedings.

In a matter related to the record, the petitioners raise the issue as to how there can be judicial review of the determination to be made by the FPC in this rulemaking proceeding. The statute expressly provides for review and the preparation of a record. Review is also required on constitutional grounds under the confiscation doctrine. The hearings must thus be held in contemplation of this review, and the record so developed must be suitable for the purpose. Also for a meaningful review the courts must know the basis for the decision by the administrative body. Thus the requirement for findings, and of equal importance the decision must be based on "the record." It must be not only based on "the record" but the agency must consider *only* the record as the basis for its decision. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372, and the quotation from Morgan above. A decision cannot be properly reviewed if it is based on matters outside the record. These requirements all relate to the constitutional confiscation doctrine prevailing in all ratefixing proceedings.

In the proceedings here contemplated only the staff members or the Commission know what material has been submitted. The parties have no knowledge as to what will be considered as part of the record and have no part in the development of the record as such during the course of the proceedings. This applies both to the record for decisional purposes and for review.

Further, with reference to the record for decision, the Commission has not stated that its determination will be based on the record alone, but has stated that it will "consider" the material

submitted by the parties. It has also said it will use its experience to resolve disputed facts. Thus the problem relates to the decisional process, the matter of review, and the preparation of a "public" record. The general method of submitting all material in writing and having the Commission staff "composite and reconcile" such data leads to a question as to whether or not the procedure is really a "hearing." Under the Act, the Commission must determine whether rates are just and reasonable and the Act provides that if the rates are not "reasonable," they are "unlawful." It is apparent from the orders entered by the Commission and from the Commission's brief that it intends to rely on much more than the submittals and responses filed by the parties in its proceedings. In the Commission's order of December 16, 1971, denying the motion for cross-examination, the Commission stated that it was "soliciting comments" and "in relying upon the experience gained through previous area rate proceedings, we will build a record upon which we can make a determination of said producers' rates." The Commission further states that the rulemaking method was chosen because of "the advantages of determining rates in a more expeditious manner, based on the informed judgment and expertise of the Commission through ten years of producer regulation," etc.

The matter of cross-examination was also raised by the petitioners and expressly ruled upon by the Commission. It stated that there was no such procedure contemplated in rulemaking proceedings, and if there was it was "permissive" and could be denied entirely (as distinct from being limited).

Cross-examination in the situation here considered has several well recognized purposes, all of which relate to the matter of a fair hearing and the traditional "hearing" in judicial and administrative proceedings. The first purpose of cross-examination usually considered is to test the accuracy of the matters or facts presented by a party. This purpose needs no further description.

Another purpose of significance here is to test the knowledge of the witness as to the matters whereof he speaks; thus to show whether or not he is qualified or has the knowledge to so speak and thus to permit an evaluation of his testimony. The order of the Commission which sets out the procedure required the "submittals" to be under oath acknowledged in a certain way. This acknowledgment required the person to swear that ". . . he has examined the statements contained in the submittal or response, and that all such statements are true and correct to the best of his knowledge, information, and belief." It is apparent that there is no way of telling the extent of such person's knowledge or information from his signature or title. There is no requirement as to the qualifications of the persons signing the submittals. Thus there is no way of testing whether the person knows whereof he speaks. The Commission does not know and the parties do not know.

Another purpose served by cross-examination is to develop the rest of a story partly told. The things which are omitted upon the direct examination are usually the most interesting and most revealing. Again with ex parte "submittals" the omitted details, when no further examination is expected, can be significant. Who better knows these things than the parties in the same or a related business?

As to bare conflicts in the facts which may result from the "submittals," the Commission says in its Order Denying Cross-Examination of December 16, 1971, that: "The existence of disagreements among the several submissions does not preclude the Commission from making a reasonable determination in light of the record before it and based on its own experience." Ratemaking after all deals with specifics, not generalities, as it can be the confiscation of the property of the regulated parties, and at the least constitutes a statutory imposition of restrictions on their earnings not so imposed on businesses in other fields.

In my opinion the proceeding here concerned is well within ratemaking. It is to resolve disputed facts, to determine rates retroactively to some extent, and to decide whether within the constitutional justification for court review the rates are just and reasonable or whether they are "unlawful." This cannot properly be done by resorting to rulemaking powers, and deciding the facts on the basis of "submittals" by anyone and which cannot be tested for accuracy or completeness, and which in turn the Commission staff will "composite and reconcile," whatever that may be. The Commission will then "consider" the submittals and whatever else is in their files and in their "experience." This may then be reviewed by the court.

This method does not appear to be within the proper construction of the Federal Power Act nor the Administrative Procedure Act, much less in accord with the established standards for a constitutional test on the confiscation issue. We must consider what the Commission has said it is going to do in its orders, what it is going to consider and how. This is the specific procedure before us, and the issues must be so evaluated.

The Commission has argued that there is a matter of urgency in view of an impending shortage of natural gas and abbreviated hearings are necessary. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, was decided in 1954 and the Act itself was passed in 1938. The area rate method was announced by the FPC in 1960. Congress has set up the regulatory machinery, and decided on the fact of regulation. We should act within this framework, and requests for substantial variations should be directed to Congress.

The orders relative to the nature of the hearing should be set aside and the matter remanded to the Commission.

Appendix B

United States of America
Federal Power Commission

Before Commissioners:
John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr., John A. Carver, Jr.
Albert B. Brooke, Jr., and Pinkney Walker

Area Rates for the Rocky Mountain Area } Docket No. R-425

NOTICE INSTITUTING PROPOSED RULEMAKING AND ORDER PRESCRIBING PROCEDURE

(July 15, 1971)

1. Notice is hereby given, pursuant to the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* (1967) and Sections 4, 5, 7, 8, 14, 15 and 16 of the Natural Gas Act[1] that the Commission proposes to issue rules fixing the just and reasonable rates and otherwise regulating jurisdictional sales by producers of natural gas in the Rocky Mountain area,[2] and to determine whether the initial rates established by Order No. 435 shall apply to contracts dated on or after October 1, 1968. The just and reasonable rates to be determined pursuant to this proceeding shall be for all jurisdictional sales of natural gas made under contracts dated before October 1, 1968. See Area Rates for Appalachian and Illinois Basin Areas, Docket No. R-371, Order Nos. 411, 411A and 411B, issued October 2, 30, and November 27, 1970, respectively.

2. Concurrently with the issuance of this notice and order, the Commission is issuing in Docket No. R-389A, *Initial Rates for*

1. 52 Stat. 822, 823, 824, 825, 828, 829, 830; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717n, 717o.

2. The Rocky Mountain Area, as subdivided into six production areas is defined in Appendix A.

Future Sales of Natural Gas for All Areas, Order No. 435, fixing the terms and conditions for new sales of natural gas in the Rocky Mountain Area applicable to contracts dated after June 17, 1970. The instant proceeding will also involve the question whether the rate established by Order No. 435 shall extend not only to contracts dated after June 17, 1970, but also to those dated on or after October 1, 1968.

3. We do not propose any specific rates, terms and conditions in this notice. Rather, we will rely in making such determination on the responses to be filed herein.

4. All large producers who make jurisdictional sales of natural gas in the Rocky Mountain Area as set forth in Appendix B, and their purchasers as set forth in Appendix C are hereby made respondents to this rulemaking proceeding.[3]

5. Any interested person may become a party to this proceeding by filing with the Secretary of the Commission, on or before August 2, 1971, a notice of intention to respond in writing pursuant to this paragraph; parties having a common interest shall combine in a group, where desirable, and advise the Secretary of that fact. The Secretary will thereupon prepare and publish a list of all parties. Parties shall certify that all other parties, or a group's designated representative, have been served with a copy of any subsequent filing.

6. As an aid to respondents and other interested parties in preparing responses, we set forth specific areas of inquiry, the purpose of which is to determine (a) just and reasonable rates for contracts dated before October 1, 1968[4], (b) whether contracts dated between October 1, 1968 and June 17, 1970 should be

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3. Large producers are defined as those making nationwide jurisdictional gas sales in excess of ten million Mcf annually.

4. We establish October 1, 1968, as the date of division between earlier and later vintages of gas to avoid a multiplicity of division dates throughout the various areas. See: Texas Gulf Coast, Opinion No. 595, issued May 6, 1971.

certificated at rates not in excess of those established by Order No. 435 for flowing gas in the Rocky Mountain Area, and (c) whether minimum rates should be established in one or more of the production areas of the Rocky Mountain Area. Our purpose is to establish rates which will result in an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining an industry capable of providing, and motivated to provide, service with its attendant risks. See: *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *Austral Oil Co. v. F.P.C.,* 428 F.2d 407, and *Texas Gulf Coast,* Opinion No. 595, ... FPC ..... issued May 6, 1971.

7. In order to expedite this proceeding, each Appendix B producer and each Appendix C natural gas pipeline which produces gas is hereby ordered and directed to complete, verify and file within 45 days from the date of issuance of this notice and order with the Federal Power Commission, 441 G Street, N. W., Washington, D. C. 20426, three copies of its flowing gas cost and operational data on an individual company 1969 test year basis. The data, together with included instructions for its preparation, covers costs and operational data for (1) the total Rocky Mountain Area and its six subareas, namely: San Juan Basin, Uinta-Green River, Colorado-Julesburg, Montana-Wyoming, Montana-Dakota and Aneth Areas as provided in Appendix D and (2) the United States (excluding Alaska) as provided in Appendix E unless by stipulation entered into by the parties the submission of such national data is not necessary.[5] Those large producers who already have submitted national cost data in Docket No. AR69-1 are not required to resubmit such data.

8. Upon receipt of the data required to be filed in Appendix D and Appendix E, the Commission staff shall composite and

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5. Copies of Appendix D and Appendix E are being sent to Respondents listed in Appendices B and C. Any interested party desiring a copy of Appendix D and Appendix E should request it when filing the notice of intent to participate for which provision is hereinafter made.

reconcile such data, and, on or before October 22, 1971, shall make copies of its composite available to any party hereto which has requested that it be served in its notice of intent filed on or before August 2, 1971.

9. Responses in writing concerning this proposed rulemaking shall be filed with the Secretary at the Federal Power Commission, Washington, D. C. 20426, by November 12, 1971.[6] Any submittal shall state the name, title, mailing address and telephone number of the person or persons to whom communications concerning this matter should be addressed, the interest in this proceeding, and whether, in addition to the conference hereinafter ordered, the person filing the submittal requests a further conference at the Federal Power Commission, which may be called at the discretion of staff. An original and fourteen copies of all submittals shall be filed. Responses to the submittals may be filed not later than November 26, 1971, in the same form and number as the original submittals. The submittals will be placed in the Commission's public files and will be available for public inspection in the Commission's Office of Public Information, 441 G Street, N.W., Washington, D.C. 20426, during regular business hours. The Commission will consider all such written submittals and responses filed by any party before issuing an order in this proceeding.

10. A conference for the purpose of developing the issues and procedures to be followed in this proceeding appears to be warranted in the public interest and shall be scheduled as hereinafter ordered.

11. All statements and submittals in response to this notice shall be under oath, acknowledged by a notary public or comparable official, as follows: (Name) being duly sworn, deposes

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6. Comments by the parties shall be directed to area costs and to such other factors as have been discussed by the Supreme Court in Permian, the Fifth Circuit in Austral, supra, and this Commission in Texas Gulf Coast, supra.

and says that he is (title organization, if filing in a representative capacity) that he is authorized to verify and file this document, that he has examined the statements contained in the submittal or response, and that all such statements are true and correct to the best of his knowledge, information and belief.

12. The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

The Commission orders:

(A) A conference shall be held on August 3, 1971, in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D.C. among the parties to this proceeding, including the Commission staff, concerning the possibility of stipulating as to the use of national cost data filed in Docket No. AR69-1, and all other issues involved and the procedures to be followed herein.

(B) The Secretary shall cause prompt publication of this notice and order to be made in the Federal Register. By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

Appendix A

ROCKY MOUNTAIN AREA PRODUCTION AREAS

Aneth Field Area — Includes that part of San Juan County, Utah, lying within Township 39 through 43 South, Ranges 18 through 26 East and Township 38 South, Ranges 20 and 21 East;

San Juan Basin Area — Consists of San Juan, Rio Arriba, McKinley and Sandoval Counties, New Mexico; and Montezuma, La Planta Archuleta, Mineral, Hinsdale, San Juan, Dolores, San Miguel, Ouray and Montrose Counties, Colorado;

Uinta-Green River Basin Area — Includes Carbon, Sweetwater, Sublette, Lincoln and Uinta Counties, Wyoming; Summit, Daggett, Uintah, Duchesne, Wasatch, Carbon, Emery and Grand Counties, Utah; and Mesa, Garfield, Rio Blanco, Moffat and Routt Counties, Colorado;

Colorado-Julesburg Basin Area — Consists of the remaining Colorado counties; Albany, Platte, Laramie and Goshen Counties, Wyoming; and Kimball, Cheyenne, Deuel, Garden, Morrill, Banner, Scotts Bluff, Sioux, Box Butte, Dawes and Sheridan Counties, Nebraska;

Montana-Wyoming Area — Includes the remaining counties in Wyoming and Park, Sweet Grass, Stillwater, Carbon, Big Horn, Yellowstone, Treasure, Rosebud and Powder River Counties, Montana; and

Montana-Dakota Area — Consists of the entire State of North Dakota; Harding, Perkins and Butte Counties, South Dakota; and Glacier, Pondera, Teton, Cascade, Meagher, Wheatland, Golden Valley, Mussellshell, Garfield, Custer and Carter Counties, Montana together with the remaining Montana counties lying north and east of the counties listed.

Appendix B

LARGE PRODUCERS OF NATURAL GAS IN THE ROCKY MOUNTAIN AREA

Respondents

Amerada Hess Corporation
American Petrofina Company of Texas
Amoco Production Company
Anadarko Production Company
Atlantic Richfield Company
Austral Oil Company, Inc.
Aztec Oil & Gas Company
Belco Petroleum Corporation
Beta Development Company
Cabot Corporation
Champlin Petroleum Company
Chevron Oil Company, Western Division
Cities Service Oil Company
Colorado Oil and Gas Corporation
Continental Oil Company
Diamond Shamrock Corporation
Forest Oil Corporation
Getty Oil Company
Gulf Oil Corporation
J. M. Huber Corporation
Humble Oil & Refining Company

Respondents

Kerr-McGee Corporation
Marathon Oil Company
Mobil Oil Corporation
Monsanto Company
Phillips Petroleum Company
Pubco Petroleum Corporation
Shell Oil Company
Signal Oil & Gas Company
Skelly Oil Company
Sohio Petroleum Company
Southern Union Production Company
Sun Oil Company
The Superior Oil Company
Tenneco Oil Company
Terra Resources, Inc.
Texaco, Inc. (sic)
Texas Pacific Oil Company, Inc.
Texas Oil & Gas Corporation
Union Oil Company of California
Union Pacific Railroad Company
Union Texas Petroleum, a Division of Allied Chemical Corporation

Appendix C

ROCKY MOUNTAIN AREA NATURAL GAS PIPELINE PURCHASERS

Respondents

Baca Gas Gathering System, Inc.
Cascade Natural Gas Corporation
Colorado Interstate Corporation
El Paso Natural Gas Company
Grand Valley Transmission Company
Kansas-Nebraska Natural Gas Company, Inc.
Montana-Dakota Utilities Company
Mountain Fuel Supply Company
Southern Union Gathering Company[1]
Westrans Industries, Inc.
McCulloch Interstate Gas Corporation
Panhandle Eastern Pipe Line Company

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1. Commission reclassification to a pipeline in Docket No. CP71-26 is still pending.

United States of America
Federal Power Commission

Area Rates for the Rocky Mountain Area	)	Docket No. R-425

ERRATA NOTICE
(July 15, 1971)

NOTICE INSTITUTING PROPOSED RULEMAKING AND ORDER PRESCRIBING PROCEDURE
(Issued July 15, 1971)

Appendix C, under column "Respondents", add the following: "McCulloch Interstate Gas Corporation, Panhandle Eastern Pipe Line Company"

Kenneth F. Plumb,
Secretary.

Appendix B

United States of America
Federal Power Commission

Before Commissioners:
John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
and Pinkney Walker

Area Rates for the Rocky Mountain Area	)	Docket No. R-425

ORDER ON RECONSIDERATION

(Issued September 7, 1971)

On July 15, 1971, we issued a Notice of Proposed Rulemaking and Order Prescribing Procedure in this Proceeding (36 F.R. 13621, July 22, 1971) proposing to issue rules fixing the just and reasonable rates and otherwise regulating jurisdictional sales of natural gas made under contracts dated before October 1, 1968 in the Rock Mountain area, and to determine whether the initial rates established by our Order No. 435 for said area should apply to contracts dated on or after October 1, 1968 for such sales. On August 9, 12, 13, 17 and 30, 1971, applications for rehearing and petitions for clarification of our order on procedure were filed by various parties to this proceeding.[1] Most of the applications for rehearing have one basis that is common to all, and our consideration of that basis shall be applicable to each application.

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1. Applications for rehearing, clarification or modification were filed by Amerada Hess Corporation, et al., Amoco Production Company, Continental Oil Company, El Paso Natural Gas Company, Four Corners Gas Producers Association, Mobil Oil Corporation, State of New Mexico, and Tenneco Oil Company. These applications are treated as motions for reconsideration, pursuant to Section 1.30(e) of the Commission's Rules of Practice and Procedure, inasmuch as there is no final order of the Commission in Docket No. R-425, as defined in Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r (1963) and Section 1.30 of the Commission's Rules of Practice and Procedure.

The petitioners contend the Commission erred in that the notice of July 15, did not provide for the promulgation of rules providing for the establishment of just and reasonable rates for any sales other than those made under contracts dated prior to October 1, 1968. The petitioners acknowledge that the rates prescribed by our Order No. 435 are initial rates, not subject to refund, for sales in this area after June 17, 1970, and that in this proceeding (Docket No. R-425) we are considering whether or not those rates should also cover sales made under contracts dated on and after October 1, 1968 to June 17, 1970. However, petitioners contend that (1) this proceeding should establish just and reasonable rates for the area for all of the periods of time involved herein, or (2) that just and reasonable rates should be established not only for the period prior to October 1, 1968, but also for those contracts dated on and after October 1, 1968 up to and including those dated on June 17, 1970. In this regard, petitioners do not aver that the Commission erred in law, but, in petitioners' opinions, it erred in its determination as to the scope of the proceeding. We do not agree. We carefully considered the procedural steps to be taken in this proceeding, which we initiated on the same date we issued Order No. 435. We there determined that the most expeditious manner in which stability in rates, and hopefully an increase in gas supply for the interstate market could be achieved is the procedure we have prescribed in our notice and order. Despite the assurances of some of the petitioners, *e.g.*, the petition and motion filed by Amoco, our experience with the lengthy adjudicatory type hearing and equally lengthy court litigation, in other area proceedings involving the establishment of just and reasonable rates causes us to conclude that the public interest requires us to restrict the issue of establishing just and reasonable rates in this proceeding to contracts dated prior to October 1, 1968. The issue of whether the initial service rates established in Order No. 435, under Section 7 of the Act, should be applied to contracts dated between October 1, 1968 and June

17, 1970, is both a policy and procedural matter within our discretion.[2] *Cf. Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *Environmental Defense Fund v. Hardin,* 428 F. 2d 1093, 1099 (CADC 1970).

Amerada Hess, *et al.,* and Continental Oil Co. state that they must be afforded an evidentiary hearing prior to the determination of just and reasonable rates. We find that such a contention is both premature and untenable at this stage of the proceeding. We need not rule on the merits of such contentions, where as here, no evidence has as yet even been submitted at this preliminary juncture. Petitioners have not set forth with any specificity either the evidence they wish to cross-examine or rebut, or the testimony they have been precluded from presenting.

However, we reject Amerada and Continental's contentions that the Commission cannot prescribe just and reasonable rates for natural gas producers without an evidentiary hearing. Petitioners have incorrectly interpreted the Commission's mandate under the Natural Gas Act and the requirements of the Administrative Procedure Act (APA). Section 2(c) of the APA, 5 U.S.C. § 551 (4)(5) (1967) expressly states that rulemaking includes ratemaking. Moreover, contrary to petitioners' contentions, rulemaking is expressly excluded from adjudication, by Section 2(d) of that Act. 5 U.S.C. § 551(6)(7) (1967).

Under Section 4 of the APA, the Commission, acting pursuant to its rulemaking authority, is required to give notice and the opportunity for interested persons to submit written comments. This we so provided for in our notice of July 15, 1971. *American Trucking Association v. U.S.,* 344 U.S. 298, 320 (1952), *Automotive Parts & Accessories Association v. Boyd,* 407 F. 2d 330, 335-8 (CADC, 1968), *California Citizens Band Association v. U.S.,* 375 F.2d 43 (CA9, 1967), certiorari denied 389 U.S. 844

2. If it is determined that Order No. 435 rates would not apply, then the rates now in effect, even if subject to refund, would continue in effect.

(1967), *Hunt Oil Co. v. F.P.C.*, 424 F. 2d 982, 985 (CA5, 1970). Even assuming *arguendo,* that a full evidentiary hearing is required, Section 7(c) of the APA specifically states that when a party will not be prejudiced in a rulemaking proceeding, procedures may be adopted for the submission of the evidence in written form. 5 U.S.C. § 556(d) (1967). Petitioners have not shown that they would be prejudiced by the procedures adopted in our notice of July 15, 1971. In fact, petitioners only attack the Commission's authority to conduct this proceeding. Thus, we reject these contentions.

El Paso, in its petition, asks the Commission to modify paragraph 7 of the notice and order of July 15, 1971, so that the requirement therein that the pipeline companies named in Appendix C to the notice and order, among which El Paso is named, shall complete, verify and file within 45 days flowing gas costs and operation data on an individual company 1969 test year basis for the Rocky Mountain Area and its six subareas, be deleted. El Paso states that historically in area rate proceedings pipeline flowing gas costs were not utilized by the staff in preparing its cost presentations. El Paso points to exhibits and testimony of staff in prior proceedings which tend to show that the staff was of the opinion that only the costs of independent producers and pipeline affiliates were to be utilized in computing staff's flowing gas costs in the area. We find these arguments persuasive. Inasmuch as pipeline production data has not been used by us in prior area rate proceedings, we see no reason to require such data in these proceedings. We will so amend our notice.

The Commission finds:

The petitions for reconsideration, filed herein by Amoco Production Company on August 9, 1971; El Paso Natural Gas Company on August 12, 1971; Amerada Hess Corporation, *et al.,* and Continental Oil Company on August 13, 1971; State of New Mexico and Four Corners Gas Producers Association on August 13, 1971, and Tenneco Oil Company on August 19, 1971, present no further facts, or principles of law which were not fully consid-

ered by the Commission in the notice and order of July 15, 1971, or which, having now been considered warrant any change or modification of that notice and order.

The Commission orders:

(1) Those natural gas pipeline purchasers listed in Appendix C of our Notice Instituting Proposed Rulemaking and Order Prescribing Procedure of July 15, 1971, are not required to furnish the data requested in that notice.

(2) In all other respects the above petitions are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

United States of America
Federal Power Commission

Before Commissioners:
John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
Pinkney Walker, and Rush Moody, Jr.

Area Rates for the Rocky Mountain Area	)))	Docket No. R-425

ORDER DENYING MOTION FOR CROSS-EXAMINATION

(Issued December 16, 1971)

On July 15, 1971, we issued a Notice of Proposed Rulemaking and Order Prescribing Procedure in this proceeding (36 *Fed Reg.* 13621)[1] proposing to issue rules fixing the just and reasonable rates and otherwise regulating jurisdictional sales of natural gas made under contracts dated before October 1, 1968, in the Rocky Mountain Area, and to determine whether the initial rates established by our Order No. 435 for said area should apply to contracts dated on or after October 1, 1968, for such sales. Motions for reconsideration of this notice were granted in part and otherwise denied by our orders of September 7, 1971, and October 20, 1971.

Amerada Hess, *et al.* (Amerada) filed a Motion for Cross-Examination on December 2, 1971,[2] which basically raises the same legal issues which we rejected in our order of September 7,

1. Appeal pending sub. nom. Phillips Petroleum Co. v. F.P.C. CA10, No. 71-1659.

2. Aztec Oil & Gas Company filed its joinder in support of Amerada's motion on December 9, 1971.

1971. For the reasons contained in that order and for the reasons stated herein we deny Amerada's motion.

Amerada requests cross-examination of nine general areas[3] "by virtue of apparent disputes of material fact and recommendations of appropriate regulatory methods." (Motion 2). Additionally, Amerada requests cross-examination of "all persons who contributed to or participated in the preparation of those sections [nine areas] of their respective comments and the data pertaining thereto." (Motion 4). Such an all-encompassing request, lacking in specificity, and without a showing of prejudice by Amerada, must be rejected. For us to grant such a motion would require the return to the lengthy, adjudicatory hearings in determining producer area rates, which we stated we desired to avoid.[4]

In a rulemaking proceeding, such as the instant one, our primary objective is the acquisition of information which will enable us, *inter alia,* to determine just and reasonable producer rates for jurisdictional sales in the Rocky Mountain area for contracts dated prior to October 1, 1968.[5] The purpose is not to allow interested parties to define the issues or narrow the scope of the proceedings.[6] On the contrary, in soliciting comments from interested parties, and in relying upon the experience gained through previous area rate proceedings, we are building a record from which we can make a determination of said producer rates. We need not, as Amerada would require us to do, lose ourselves in an

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3. These general subjects include (1) rate recommendations (2) cost estimates, (3) gathering allowance, (4) price escalations, (5) tax allowances, (6) potential gas estimates, (7) cut-off dates for old and new gas, (8) reinvestment of flowing gas rate increases, and (9) regulatory methods. In each instance, Amerada refers to these subjects as discussed in submittals by Staff and other parties (Motion 3).

4. E.g. Order on Reconsideration, September 7, 1971, at 2.

5. Cf. City of Chicago, et al., v. F.P.C., CADC., No. 23,740, December 2, 1971, Slip Op. at 22-3. See also Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 892 (D.C.D.C., 1965).

6. Pacific Coast European Conference v. U.S., 350 F.2d 197, 205 (CA9), certiorari denied, 382 U.S. 958 (1965).

excursion into detail which would obscure, rather than clarify, the issues before us.[7]

While we would prefer to avoid repetition of the rationale for denial of Amerada's request for a full adjudicatory hearing,[8] Amerada misconstrues our decision in that regard. Although Section 5(a) of the Natural Gas Act[9] requires a hearing, there is no requirement that such hearing be made "on the record." Accordingly, Section 4 of the Administrative Procedure Act (APA) requires notice and the opportunity for interested persons to submit written comments.[10] Such a hearing, namely one conforming to Section 4(b) of the APA, is all that is required by the APA and the Natural Gas Act and Sections 7 and 8 of the APA are inapplicable.[11]

Amerada ignores the clear language of Section 4(b) of the APA and seeks instead to come within Section 7(c) of that Act, 5 U.S.C. § 556 (1967), which states:

> In rule making * * * an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

However, Section 7(c) is only applicable where rules are required to be made "on the record," which is not the case with Section 5(a) of the Natural Gas Act. Even assuming *arguendo* that Section 7(c) is controlling in the instant proceeding, we cannot determine how Amerada has been, or will be, prejudiced

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7. WBEN, Inc. v. U.S., 396 F.2d 601, 618, (CA2), certiorari denied, 393 U.S. 914 (1968). Cf. American Airlines, Inc. v. C.A.B., 359 F.2d 624, 629-30 (CADC), certiorari denied, 385 U.S. 843 (1966).

8. Amerada's request of August 13, 1971, was rejected in our order of September 7, 1971.

9. 15 U.S.C. § 717d (1963).

10. Section 4(b) of the APA states that (5 U.S.C. § 553 (1967):
> When rules are required by statute to be made *on the record* after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection. [Emphasis added.]

11. Pacific Coast European Conference v. U.S., supra at 205; Siegel v. A.E.C., 400 F.2d 778, 785 (CADC, 1968).

by the adoption of the procedures in Docket No. R-425.[12] Amerada has not pointed to specifics on which it needs to cross examine or present live rebuttal testimony. Instead, Amerada refers to general subjects to which it, and other interested parties, have filed written submissions, and states as reasons for its requests, "apparent disputes." (Motion 2). Nor do "apparent disputes," without any more, prejudice the rights of Amerada and others to present their views.[13] If Amerada disagreed with such submissions, it had the opportunity to submit its responses thereto by December 10, 1971.[14] The existence of disagreements among the several submissions does not preclude the Commission from making a reasonable determination in light of the record before it and based on its own experience.

The Commission finds:

The motion for cross-examination filed herein by Amerada Hess, et al. on December 2, 1971, joined in by Aztec Oil & Gas Company, presents no further facts or principles of law which were not fully considered by the Commission in its notice of July 15, 1971, its Order of September 7, 1971, or which having now been considered warrant any change or modification of that notice and order.

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12. Long Island R.R. Co. v. U.S., 318 F.Supp. 490, 498-9 (E.D.N.Y., 1970). Nor is this a case where Amerada, unlike Seaboard and FEC, has shown with any degree of specificity, why it has been prejudiced. Florida East Coast Ry. Co. v. U.S., 322 F. Supp. 725, 728-9 (M.D. Fla., 1971).

13. Automotive Parts & Accessories Ass'n. v. Boyd, 407 F.2d 330, 343 (CADC, 1968).

14. Our original notice of July 15, 1971, provided for responses to submittals to be filed by November 26, 1971. This was extended until December 10, 1971, by a November 15 letter of the Secretary of the Commission. Amerada, while relying on Section 7(c) of the APA, has not shown cross-examination is required for a "full and true disclosure of the facts" in the procedures adopted by the Commission.

The above motions for cross-examination should be denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr.,
Albert B. Brooke, Jr.,
Pinkney Walker, and
Rush Moody, Jr.

Area Rates for the
Rocky Mountain Area } Docket No. R-425

ORDER DENYING MOTIONS FOR RECONSIDERATION

(Issued February 14, 1972)

On July 15, 1971, we issued a Notice of Proposed Rulemaking and Order Prescribing Procedure in this proceeding, 36 F.R. 13621, July 22, 1971, proposing to issue rules fixing the just and reasonable rates and otherwise regulating jurisdictional sales of natural gas made under contracts dated before October 1, 1968, in the Rocky Mountain Area, and to determine whether the initial rates established by our Order No. 435[1] for said Area should apply to contracts dated after October 1, 1968, through June 17, 1970, for such sales.

Certain of the parties herein filed motions for reconsideration of the notice and order, which were granted in part and otherwise denied by orders of September 7 and October 20, 1971. Subsequently, Amerada Hess, *et al.*, (Amerada) filed a motion for cross-examination which was denied by order of December 16, 1971. Applications for rehearing of that order were filed on

1. Opinion and Order Establishing Initial Rates In The Rocky Mountain Area, Docket Nos. R-389 and R-389A, Order No. 435, issued July 15, 1971.

January 14, 1972, by Amerada, and on January 17, 1972, by Amoco Production Company (Amoco) and Mobil Oil Corporation (Mobil), respondents in this proceeding.[2]

We stated in our order of December 16, which respondents now ask us to reconsider, that the motion which *Amerada* had filed "* * * basically raises the same legal issues which we rejected in our order of September 7, 1971." Additionally, we noted that "* * * we would prefer to avoid repetition of the rationale for denial of Amerada's request for a full adjudicatory hearing * * *."

The legal bases for the proceeding which we have set forth in this proceeding are not unknown to respondents. Our course of action herein has been fully explained, and followed by us in establishing just and reasonable rates for other areas, and we considered and explained why each of the contentions that respondents make here, and have made before are without merit, *Area Rates For The Appalachian And Illinois Basin Areas,* Docket No. R-371, *et al.,* Order Nos. 411 and 411-B, 44 FPC 1112 and 1487; *Chicago of Chicago, et al. v. F.P.C.,* .... F.2d .... (No. 23,740) (CADC, 12/2/71). We believe there is no need, or reason to iterate and reiterate the statutory authority, and judicial precedent under which we proceed herein.

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2. The applications seek rehearing of a interlocutory procedural order in a rulemaking proceeding, and accordingly shall be considered as applications for reconsideration under Section 1.30(e) of the Commission's Rules of Practice and Procedure.

The Commission finds:

The motions for reconsideration filed by Amerada Hess Corporation, *et al.*, on January 14, 1972, and by Amoco Production Company and Mobil Oil Corporation on January 17, 1972, present no further facts or principles of law which were not fully considered by the Commission in its order of December 16, 1971, or which having now been considered warrant any change or modification of that order.

The Commission orders:

The above motions for reconsideration are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

Appendix C

MARCH TERM — APRIL 11, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

Phillips Petroleum Company, a Delaware corporation, et al., Petitioners, v. Federal Power Commission, Respondent.	Nos. 71-1659, 71-1739, 72-1134, 72-1167

This matter comes on for consideration of Petitioners' motion for an extension of time within which to file a petition for rehearing and to file a suggestion for rehearing en banc in the captioned consolidated cases.

Upon consideration whereof, the motion for extension of time to file such petition and suggestion is granted to March 23, 1973.

The Court has for consideration the joint and several petition for rehearing filed by the Petitioners and Producer Intervenors on March 23, 1973 and the suggestion for rehearing en banc filed on March 23, 1973 by Petitioners and Producer Intervenors.

Upon consideration whereof, the joint and several petition for rehearing is denied by Judges Seth, McWilliams and Doyle to whom the cases were argued and submitted.

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By /s/ ANNE CABOT
Deputy Clerk

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS

MARCH TERM — APRIL 11, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

Phillips Petroleum Company, a Delaware corporation, et al., Petitioners, v. Federal Power Commission, Respondent.	Nos. 71-1659, 71-1739, 72-1134, 72-1167

This matter comes on upon the Court's own motion for the correction of its Order entered herein on April 11, 1973, the fourth (4th) paragraph of which reads as follows:

> "Upon consideration whereof, the joint and several petition for rehearing is denied by Judges Seth, McWilliams and Doyle to whom the cases were argued and submitted."

The Order is corrected to have the fourth (4th) paragraph read as follows:

> "Upon consideration whereof, the joint and several petition for rehearing is denied. Judge Seth voted to grant the petition."

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit
By /s/ ANNE CABOT
Deputy Clerk

Appendix D

Administrative Procedure Act, §§ 551(4)-551(7), 553, 554, 556, 557, 559 and 706, 5 U.S.C. §§ 551(4)-551(7), 553, 554, 556, 557, 559 and 706:

§ 551. Definitions

For the purpose of this subchapter—

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order; * * *

* * * * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

* * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to

submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * *

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5362, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5362, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

* * * * *

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Natural Gas Act of 1938, §§ 4, 5, 15, 16, 19(b), 52 Stat. 822, 823, 829, 830, 831, as amended, 15 U.S.C. §§ 717c, 717d, 717n, 717o, 717r(b):

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with

the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid,

and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without

prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * * *

HEARINGS; RULES OF PROCEDURE

SEC. 15. (a) Hearings under this Act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the

form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

* * * * *

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 19. * * *

* * * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which

upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-91

CHEVRON OIL COMPANY, WESTERN DIVISION; AMERADA HESS CORPORATION; EXXON CORPORATION; MARATHON OIL COMPANY; and TEXACO INC., PETITIONERS

vs.

FEDERAL POWER COMMISSION; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; ATLANTIC RICHFIELD COMPANY; BELCO PETROLEUM CORPORATION; BETA DEVELOPMENT COMPANY; CONTINENTAL OIL COMPANY; GULF OIL CORPORATION; HIGH CREST OILS, INC.; SKELLY OIL COMPANY; SUN OIL COMPANY; TENNECO OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; THE STATE OF NEW MEXICO; FOUR CORNERS GAS PRODUCERS ASSOCIATION; UNITED DISTRIBUTION COMPANIES; EL PASO NATURAL GAS COMPANY; PUBCO PETROLEUM CORPORATION; SOUTHERN CALIFORNIA GAS COMPANY; AZTEC OIL & GAS COMPANY; AND SHELL OIL COMPANY, RESPONDENTS

Supplemental Brief in Support of Petition for a Writ of Certiorari

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Supplemental Brief in Support of Petition for a Writ of Certiorari

Petitioners submit this supplemental brief pursuant to

Rule 24, to call attention to a new case not available at the time of filing their petition for a writ of certiorari.

The decision issued on July 11, 1973 by the United States Court of Appeals for the District of Columbia Circuit in *Mobil Oil Corporation* v. *Federal Power Commission* [1] presents an additional and compelling reason why this Court should grant the petition for a writ of certiorari in the case at bar. The unanimous District of Columbia Circuit Court takes direct issue with the decision of the majority of the Tenth Circuit panel in the case at bar, specifically agreeing with the dissenting judge below (Appx. pp. 46-47). The resulting conflict of decision is not only within the stated terms of Rule 19, but is one which, in the context of the current energy crisis, the pending nationwide ratefixing proceedings, and the need for authoritative guidelines in dealing with them, requires prompt resolution by this Court in the national interest.

The point of conflict is clear-cut, and goes to the heart of the issue presented by the petition herein. The court below approved area ratefixing under the Natural Gas Act by informal rulemaking; i.e., with no opportunity for cross-examination and for rebuttal of evidence thereby brought to light, or to be apprised of any extra-record evidence considered by the agency. Petitioners argued that due process and the specific terms of the Natural Gas Act and the Administrative Procedure Act in conjunction require such area ratefixing to be accomplished by no less a procedure than formal rulemaking [2] under §§ 556 and 557 of the Administrative Procedure Act, with right of cross-examination, rebuttal, and an "exclusive" (i.e., all-inclusive) record.

The Court in *Mobil,* while not adopting the ultimate con-

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[1] A full copy of the decision is appended to this supplemental brief. References thereto appear herein as "Appx. p. ——."

[2] The alternative would be "adjudication" under § 554 of the Administrative Procedure Act.

clusion that the full range of § 556 and § 557 procedures are required, agrees with the basic reasoning of petitioners here and strongly disagrees with the majority decision in the case at bar. It says that in the ratefixing process informal rulemaking is not enough; that the rights of cross-examination and an exclusive record are essential. The "substantial evidence" requirement (Appx. pp. 38-41), the requirement of a "whole record" (Appx. p. 43), and the requirement of "procedures which will adequately test the Commission's factual determinations and create a record that will allow a reviewing court to examine the agency's actions" (Appx. p. 48)—all of which petitioners have urged in their petition to this Court—demand substantially more than the informal procedure approved by the court below. How much more, *Mobil* decides, must be determined in the individual case. But it is clear that the *Mobil* court viewed the procedures employed in the case at bar, involving only the right to submit written comments in response to the written submittals of others, as inadequate (Appx. pp. 43, 46-48). In any event, the unanimous court in *Mobil* and the dissenting judge here below are basically in agreement with each other, and expressly opposed to the two-judge majority in the case at bar.

This conflict requires prompt resolution in the national interest. Again we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1471

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR

Petition for Review of Order of the Federal Power Commission

Argued 13 March 1973

Decided 11 July 1973

Carroll L. Gilliam, with whom *Tom P. Hamill* and *Philip R. Ehrenkranz* were on the brief for petitioner.

Joan E. Heimbigner, Attorney, Federal Power Commission with whom *Leo E. Forquer*, Acting General Counsel and *George W. McHenry, Jr.*, First Assistant Solicitor, Federal Power Commission were on the brief for respondent.

Peter H. Schiff, General Counsel, Public Service Commission of the State of New York, *Richard A. Solomon* and *Paul M. Ruden* were on the brief, for intervenor.

Before LEVENTHAL and WILKEY, *Circuit Judges*, and JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This case arises on petition for review of orders of the Federal Power Commission setting minimum rates required to be charged by natural gas pipelines for the transportation of certain liquid and liquefiable hydrocarbons. As a producer of natural gas and other petroleum products required to pay these transportation rates, petitioner challenges their validity on the grounds that (1) the Federal Power Commission has never been granted jurisdiction to establish rates for liquid and liquefiable hydrocarbons; (2) the Commission unlawfully used privileged data submitted as part of an unaccepted settlement proposal in formulating the rates; (3) the Commission violated certain procedural requirements in establishing the rates; and (4) in any case, there is no evidentiary basis for the rates promulgated by the Commission. We find that the Commission does have jurisdiction to establish at least some of the rates involved in this action and that the Commission under certain safeguards could lawfully use the data submitted as a part of an unaccepted settlement proposal. On the record currently before the court, however, we are not able to determine whether the rates have a valid evidentiary basis, nor are we satisfied that the procedure employed by the Commission here met the requisite standard for the objectives the Commission was seeking to accomplish. We therefore set aside the orders of the Federal Power Commission here challenged, and remand for further proceedings.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

I. *Background*

The mechanics of natural gas production are such that gas and liquid hydrocarbons (*i.e.*, crude oil) are often produced simultaneously from a single well. The gaseous product of the well may also contain some hydrocarbons which, although in a gaseous form when released from the ground, may later be liquefied and treated as a liquid. Thus a single well often produces simultaneously liquid, liquefiable, and gaseous hydrocarbons; the gaseous product is sold at or near the wellheads to interstate pipelines.

The economics of natural gas production often preclude having facilities at each well to separate the three products for individual transportation. Consequently, an interstate natural gas pipeline company may at times transport liquids and liquefiables through a single pipeline, even though it is only interested in purchasing a gaseous product of the well after the original natural product is separated into component parts.

The contractual aspects of natural gas production have evolved with due regard to these natural and economic phenomena. The producer and the pipeline frequently agree that the producer will sell the gas from the well but reserve title to all the liquids and liquefiables transported. The gas pipeline company transports, along with the gas it purchased, various quantities of liquids and liquefiables that are still owned by the producer.

This transportation service constitutes a *value* to the producer, since he must have some way of transporting his oil to the refinery, and a *cost* to the pipeline, since the use of its pipeline capacity to transport oil reduces its ability to transport gas. Thus the rate charged a producer for transporting liquids has a direct effect upon what must be charged for the transportation of gas, if the pipeline is to operate at a profit.

The Federal Power Commission has by statute the duty to establish "just and reasonable" rates for the transportation and sale of natural gas traveling in interstate commerce.[1] Thus the Commission clearly has the authority

[1] This responsibility is imposed under sections four and five of the Natural Gas Act. The relevant provisions of that Act are as follows:

> Section 4(e). Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges

to regulate the transportation charges of gas pipeline companies for natural gas. The statute does not, however, grant the Commission the power to regulate pipeline transportation charges for liquid products.[2]

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by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedly as possible.

15 U.S.C. § 717c (1970).

The relevant portion of section 5(a) is as follows:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine that just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

15 U.S.C. § 717d (1970).

[2] The Natural Gas Act is completely silent regarding the regulation of liquid petroleum. Aside from the negative conclusion to be drawn from the title, the few remarks in the

The ability to regulate transportation rates for gas and arguably liquefiables, but not for liquids, creates an obvious problem. The transportation rates for all three are interrelated; it follows that what are "just and reason-

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legislative history regarding liquid petroleum indicate that Congress did not intend the Natural Gas Act to grant jurisdiction over oil. In the hearings on the bill before a subcommittee of the House Committee on Interstate and Foreign Commerce, the following colloquy took place between Mr. Dozier A. DeVane, Solicitor of the Federal Power Commission, and Representative John G. Cooper of Ohio:

Mr. COOPER. Would you classify oil as a public commodity as a necessity?

Mr. DEVANE . I have not done so; no, sir.

Mr. COOPER. It is transported in interstate commerce.

Mr. DEVANE. Yes, sir.

Mr. COOPER. And the Federal Government has tried or attempted to regulate the price of that transportation.

Mr. DEVANE. It is regulating the price of the transportation.

Mr. COOPER. But does not regulate the price of oil?

Mr. DEVANE. It does not regulate the price to the consumer.

Mr. COOPER. Well, a lot of oil is being burned these days, a tremendous lot of oil is being burned, as well as natural gas, and I just was wondering whether any steps are going to be taken to regulate the wholesale price of oil?

Mr. DEVANE. I suppose the answer to the question that you raise is that gas sold to the public in every community is a monopoly so far as that community is concerned and it is my opinion that if the oil business was the same, or the coal business was the same, or any other single business, that had a complete monopoly insofar as the consuming public was concerned in any substantial number of communities of the country, that it would be necessary to subject that business to regulation.

My theory of regulation is that it certainly goes with monopoly and in the gas field, as in the electric field, and

able" rates for natural gas is related to what are the actual costs and proper charges for transporting liquids and liquefiables. For example, if a pipeline company charges the producer less than the actual cost of transporting liquids and liquefiables, the extra cost must be allocated to the other product being transported, natural gas, with the resulting danger that the consumer of natural gas will be asked to pay this extra transportation cost in the form of higher gas prices.

Between 1954 and 1968 the Federal Power Commission, as the agency obligated to assure that gas rates are "just and reasonable," sought to assure that the costs of transporting liquids and liquefiables were not passed along to gas consumers. It followed the practice of considering the problem on an individual basis when producers applied for certificates to sell natural gas to pipelines or when holding hearings on the reasonableness of pipeline rates. With information as to the type of transportation involved and the contractual arrangement between the producer and the pipeline, the FPC would determine what proportion of transportation costs should be attributed to the transportation of liquids and liquefiables. The Commission would then approve the certificate or rate schedule on the condition that the expenses be appropriately allocated.

It is critically important to understand that under this method the Commission was not setting rates that had to be charged for the transportation of liquids and liquefiables by the gas pipelines. It was simply saying that a certain percentage of transportation costs *could not* be

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as in the telephone field, there should be a monopoly in serving communities.

Hearings on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess., at 27 (2 April 1936).

charged to the transportation of natural gas. It is clear and no one disputes that the Commission was empowered to do this under its authority to set "just and reasonable" rates for the transportation of natural gas.

II. *The Commission's Action*

By notice issued 5 February 1968 the Commission announced that it was "contemplating adopting a statement of general policy" providing that the Commission would allocate an appropriate proportion of costs to the transportation of liquids and liquefiables.[3] In essence, this

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[3] This notice further stated that:

> "We have reached a tentative conclusion that it might be preferable and sufficient for purposes of consumer protection, to allocate out of the cost of service applicable to other jurisdictional services the liquid transportation costs in pipeline cases, leaving it to the pipelines to negotiate fair compensation from the owner of the liquids or the liquefiable hydrocarbons. But before adopting any general policy to guide our future actions we believe it advisable to secure the comments of all interested parties."

The Commission also stated that in the interim, it would condition future producer certificates "involving transportation of producer liquids and/or liquefiable hydrocarbons from off-shore to on-shore" upon the outcome of the rulemaking proceeding, and would do so for other proposed sales involving pipeline transportation or producer liquids "if the transportation was substantial distances"

The Notice included the text of a proposed amendment of the Commission's "General Policy and Interpretations." That proposal stated:

> "In reviewing and determining the costs that are allocable or ascribable to sales by pipeline companies of natural gas for resale or to transportation of natural gas in fixing pipe line rates therefor, the Commission will, insofar as the pipeline company transports on shore from offshore for substantial distances liquids, liquefiable hydrocarbons, and related fuel for others, allocate an ap-

proposal would have formalized the procedure already used to assure that transportation costs attributable to non-gas products were not paid by gas consumers. The notice did not clearly indicate whether the procedure would establish a single uniform proportion applicable to all producers, nor did the notice contain any intimation that the Commission would establish *rates* that pipelines *must* charge producers for transporting liquids and liquefiables; in fact, the implication was to the contrary. Both omissions, particularly the latter, were of great significance, if in fact the FPC intended to make changes in long-followed regulatory procedures.

In response the Commission received comments from fifteen natural gas producers, including Mobil, eleven pipeline companies, and two state agencies. Only the two state agencies supported the "policy" as proposed.[4]

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propriate portion of transportation costs to such liquids, liquefiable hydrocarbons, etc., regardless of whether the pipeline company has separately charged therefor."

Notice of Proposed Statement of General Policy, Docket No. R-338, 33 *Fed. Reg.* 2860-63 (1968).

[4] The disagreement on the portion of the proposal involved here fell into six distinct categories: (1) Rates for transportation of liquefiable hydrocarbons could not be set on a general "policy" basis because of the diversity of facts involved. (2) An informal rule-making proceeding was not the proper forum for considering transportation charges; any such determination must be made pursuant to an evidentiary hearing. (3) The rule is unnecessary because existing pipeline cost-of-service rates already reflect the costs involved in transporting producers' liquids and liquefiable hydrocarbons. (4) Usually liquid movement is without significant cost to the pipeline, and thus a *de minimis* rule should apply unless there are exceptional circumstances. (5) The imposition of minimum rates for the transportation of liquids will inhibit natural gas exploration and discovery efforts. (6) Available alternatives to cost allocation should be considered by the Commission before making a final determination.

None of the commenting parties presented any data regarding pipeline costs, distances, or any other facts that would be relevant to determining what proportion of costs should be allocated to the transportation of liquids and liquefiables if the Commission chose to adopt such a policy. No technical, financial or other data were submitted in any form, by affidavits or statement. It is a fair implication from all of this that all parties understood that the proposed rule was designed to determine whether the Commission should at some future time hold proceedings to determine specifically the proportion that would be generally applicable. From the nature of the comments received, it is clear that none of the interested parties felt, at least initially, that the rule-making proceedings then underway would result in allocating an actual proportion. There was even less reason for anyone to think that the Commission would set specific rates for the transportation of liquids and liquefiables, since there was no mention of rates in the proposal for rule-making. The interested parties undoubtedly felt that they were commenting on a "general policy"—as it had indeed been described in the published proposal.

No action was taken by the Commission on its proposal for two and one half years. On 10 September 1970 parties who had filed comments were informed that a "conference" had been called by the Commission Staff Counsel on 29 September 1970 to discuss the proposed rule.

An attorney from the Commission's Office of General Counsel conducted this conference. No transcript of this conference was taken, although "minutes" in the form of a paraphrase of the discourse were prepared and distributed later by the FPC staff. The Commission attorney conducting the meeting stated that the FPC staff was at a "disadvantage" because the "comments" "did not contain

any substantial factual data."[5] To remedy this, the parties were asked to "develop factual data" on the issue. It was noted that transportation charges of the sort in issue were involved in the Southern Louisiana area rate proceeding that was currently underway. The parties agreed to adjourn this initial conference to await the outcome of settlement meetings being conducted in the Southern Louisiana case. All parties clearly understood that this was an exploratory meeting and that additional notice would be given if the nature of the proceedings changed.[6]

A second meeting was held on 15 October 1970. At this conference counsel for certain pipeline companies distributed nine sheets containing tabulations of cost of service figures which had been compiled for use in the Southern Louisiana Rate proceedings. It is clear from the minutes that this data was submitted solely for the purpose of attempting a settlement in the rule-making proceeding. It was in no sense evidence; the data's accuracy was not examined by other parties, no controverting data was introduced by anyone, and no witness who might have been cross-examined sponsored the figures.

The "minutes" also show that the FPC staff suggested settlement of the entire matter. It is unclear from the record what was meant by "settlement" or what form was contemplated. The minutes recite that "the suggestion was not favorably received," because a number of the parties "had not come prepared to consider the matter on a nationwide basis" due to the short notice that had been given.[7] The ultimate decision to emerge from this meeting was that

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[5] Minutes of Conference of 29 Sept. 1970, Docket No. R-338 (reprinted at Joint App. 34).

[6] *Id.* (Joint App. at 36).

[7] Minutes of Conference of 15 Oct. 1970, Docket No. R-338 (reprinted at Joint App. 47).

"*further conferences in this proceeding* should be deferred pending" the outcome of efforts to settle similar issues in the *Southern Louisiana* area rate proceedings.[8]

The settlement offer in *Southern Louisiana* did not meet with unanimous approval. However, the figures submitted in the context of this general settlement offer were eventually accepted by the Commission as being just and reasonable in a decision on the merits in that case.[9]

Without further conferences or notice in the rule-making proceeding challenged here, by Order No. 449 the Commission established generally applicable nation-wide rates for the transportation of liquid and liquefiable hydrocarbons.[10] The Commission stated that these rates were being

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[8] *Id.* (Joint App. at 48).

[9] The Commission's actions in that proceeding have recently been affirmed by the Fifth Circuit in *Placid Oil Co.* v. *FPC* (SoLa II), No. 71-2761 (5th Cir., 16 Apr. 1973).

[10] *Order Establishing Charges for Transporting Liquids and Liquefiable Hydrocarbons*, FPC Order No. 449, 37 *Fed. Reg.* 2957 (31 Jan. 1972).

The Commission in its order referred to the content of the comments that had initially been submitted by the parties to the rule-making, to the events that had transpired at the two conferences that had been held, and to the contents of the nine sheets that had been handed out by some of the pipelines at the second conference. Reference was also made to the figures used in establishing the rates for liquids and liquefiables in the Southern Louisiana proceeding and to the contents of yet another pipeline rate proceeding. On the basis of this information the Commission stated that it had determined to prescribe minimum rates for the transportation of liquids and liquefiables for the entire nation. The rule *required* that pipeline companies charge at least two cents per Mcf per 100 miles for transporting liquefiables and twenty cents for transporting liquids. Pipeline companies would be free to charge more than this for transporting liquids and liquefiables, but they could not charge less.

promulgated on the basis of the general rule-making proceeding that had been suspended pending the outcome of the *Southern Louisiana* settlement efforts. In issuing these rate schedules the Commission stated that it had concluded that the mere "allocation of costs" was not a feasible way of assuring that gas consumers would not be forced to pay a portion of the transportation costs of liquids and liquefiables; no reason was given for this conclusion.[11]

Thus what had begun as a Commission proposal to devise

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[11] This rule amended Part 2, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations by adding a new section 2.71, which read as follows:

§ 2.71 Charges applicable to the transportation of liquids, liquefiable hydrocarbons, etc., for others.

When pipeline companies contract to purchase gas and agree to transport liquids and liquefiable hydrocarbons from field delivery points to processing plants for removal of such hydrocarbons, the transportation charge to be imposed for such service shall be the consideration set forth in the contracts between the pipeline companies and those for whom the transportation service is rendered, unless the contractual consideration is less than .02 cents per Mcf per mile for liquefiable hydrocarbons and 20 cents per barrel for liquid hydrocarbons, in which case the aforesaid minimum charges shall apply. For sales certificated subject to the outcome of the rulemaking proceeding in Docket No. R-338, and for sales certificated after March 1, 1972, the transportation charge as of March 1, 1972, or as the date of initial delivery, whichever is later, shall be as set forth in the respective contracts, unless the contractual consideration is less than the aforementioned minimum charges, in which case the minimum charges shall apply. The payment of the charges hereinbefore specified shall exempt any sales associated therewith from reductions in ceiling prices because of the rendering of the above-described transportation services by pipeline companies for sellers of gas.

or define a policy of allocating costs had resulted in establishing rates. The original proposal, had it been adopted, would have said that pipelines could not charge the gas consumer a certain proportion of costs attributable to the transportation of products other than gas; the pipelines under this rule would not have been *obligated* actually to charge the product owner the proportion attributable to liquids and liquefieables. Mobil and others applied for rehearing, which was denied by the Commission. From this denial, Mobil brings this appeal.

Mobil raises a number of issues, two of which we believe are worthy of extended discussion.[12] First, Mobil argues that the Commission has no authority to set rates for the transmission of liquid hydrocarbons. It does not contest the FPC's jurisdiction to establish rates for liquefiables, but contends that the portion of the rate schedule dealing with liquids must be set aside as being outside the powers conferred by the Natural Gas Act. Second, Mobil urges that all the rates for both liquids and liquefiables are invalid

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[12] Appellant's third main argument is that the rates set in this case are invalid because they are based upon evidence that under the Commission's own rules could not be considered. The Commission's rules do provide that "unaccepted proposals of settlement . . . shall be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege." 18 C.F.R., Ch. 1, Subch. A, pt. 1, § 1.18(e) (1970). The Commission, however, has interpreted this language to mean that such a priviliege is not available to all parties to a proceeding, but may only be claimed by the person who made the offer. This court recently affirmed this interpretation of the rule, finding it neither arbitrary nor unreasonable. *Mobil Oil Corp.* v. *FPC*, —— U.S. App. D.C. ——, 469 F.2d 130, 138 n.8 (1972), *cert. denied*, 41 U.S.L.W. 3635 (S. Ct., 5 June 1973). Since appellant did not make the settlement offer from which the data was taken it cannot protest the use of this information if its use was otherwise valid.

because the Commission erred in using "informal" rulemaking procedures to fix specific minimum rates. It is argued that under the Natural Gas Act and the Administrative Procedure Act such rates can only be promulgated pursuant to formal, evidentiary hearings. Mobil raises as a separate issue the assertion that there is no "substantial evidence" on the record as a whole to support the Commission's findings of cost that were used in setting the rates under review. We believe the "substantial evidence" issue is closely related to the issue of what procedures are required in this case; the two issues will therefore be treated together in Part IV below.[13]

III. *Jurisdiction to Set Rates for the Transmission of Liquid Hydrocarbons*

The Commission's regulatory authority in this area comes solely from the Natural Gas Act, which provides in relevant part that "[t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . . ." [14] The Act defines such natural gas as "either natural gas unmixed, or any mixture of natural and artificial gas . . . ." [15] This definition has been construed to mean a "mixture of gaseous hydrocarbons found in nature." [16]

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[13] Mobil also argues that the rates are unduly discriminatory and unduly preferential. Because of inadequacies in the record, discussed in Part IV, *supra*, we are not able to evaluate this argument at this time. As with appellant's argument that there is not substantial evidence to support the Commission's findings, this issue is dependent on the adequacies of the administrative procedures used in setting the rates. We, therefore, do not discuss this as a separate issue at this time.

[14] Natural Gas Act, 15 U.S.C. § 717b (1970).

[15] *Id.* at § 717a(5).

[16] *Deep South Oil Co.* v. *FPC*, 247 F.2d 882, 888 (5th Cir. 1957). The sections of the Act prescribing Commission power to review and determine the rates at which natural gas is

The common thread running through all statements and interpretations of Commission jurisdiction is that its authority extends solely to "natural gas" and that "natural gas" is, as the name implies, gaseous and not liquid petroleum. There is no intimation in either the Natural Gas Act or decided cases that the Commission should be empowered to regulate the transportation of liquids.[17] In the past, this distinction between Commission jurisdiction over natural gas and absence of jurisdiction over liquids has been observed by both the Commission and the courts.

In the Commisison's decision in *Phillips Petroleum Co.*,[18] the Commission concluded that the operation of a gasoline plant was nonjurisdictional and that the production of liquids was not a mere incident to the selling of gas. In

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transported or sold grant only the power to set rates for "the transportation and sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 66 717c(a) and 717d (a) (1970). The FPC's power to regulate has been interpreted to extend to "three things and three only": (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation and sale. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 322 U.S. 507, 516 (1947).

[17] Indeed, the inference is to the contrary. *See* footnote 2, *supra.*

[18] 24 F.P.C. 537 (1969). This case involved jurisdiction over plants for extraction and processing liquids and the relationship of those operations to the cost of service attributable to gas production. The Commission stated the issue as being "whether the gasoline plant operations should be considered jurisdictional, in which case the gasoline plant costs and revenues would have to be reflected in the jurisdictional gas cost of service, or whether the gasoline plant operations should be considered non-jurisdictional, in which case some method is necessary for allocating costs between the liquids separated in the gasoline plants and the residue gas." *Id.* at 562.

the context of pipeline transportation, the distinction between the commodities was similarly recognized by this court's opinion in *Mid-America Pipeline Co.* v. *FPC*.[19] In that case a party claimed that a liquid extraction plant was subject to the Commission's jurisdiction because the facility was used as a conduit through which gas was transmitted. We rejected this argument and stated that the Commission was not required to exercise jurisdiction over the extraction operations.[20] Of particular relevance here, we noted that the interests of the gas consumer could be adequately protected by allocating costs between the operations over which the Commission had jurisdiction and those which it did not.[21]

The several cases cited by the Commission do not support its assertion of jurisdiction over liquids.[22] In *Permian*

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[19] 117 U.S. App. D.C. 352, 330 F.2d 226 (1964).

[20] *Id.* at 355, F.2d at 229.

[21] In a similar vein the Commission has said

> that neither the conversion of the Little Inch to the transportation of petroleum products nor its operation as a products carrier is subject to the jurisdiction of this Commission. In the matter of rates and certain other aspects, it would be regulated by the Interstate Commerce Commission.

Texas Eastern Transmission Corp., 17 F.P.C. 843, 851 (1957), remanded on other grounds *sub nom.*, *Chotin Towing Corp.* v. *FPC*, 102 U.S. App. D.C. 69, 250 F.2d 394 (1957).

[22] In one paragraph of its 68-page opinion in *Placid Oil Co.* v. *FPC (SoLa II)*, —— F.2d ——, No. 71-2761 (5th Cir., 16 Apr. 1973), the Fifth Circuit approved rates set by the FPC for the transportation of liquids. *Id.* at 63. This approval cannot, however, be taken as supporting the Commission's assertion of jurisdiction over liquids in the case at bar. The Fifth Circuit did not consider or even mention the jurisdictional issue which now confronts this court. In light of the otherwise exhaustive nature of the opinion, we can only con-

Basin Area Rate Cases[23] the Supreme Court merely affirmed the Commission's assertion of jurisdiction over a *gaseous* stream of "casinghead gas" which included "entrained liquids" in a non-liquid form. Since this product was not a liquid at the time of production, *Permian* is neither decisive nor relevant here.

In *FPC* v. *Louisiana Power & Light Co.*[24] the Supreme Court simply upheld the Commission's jurisdiction over the pipeline company's transportation of *natural gas;* the Commission was not setting rates for that commodity. The Commission has always had the power to regulate natural gas being transported in interstate commerce; this case does not constitute an expansion of the FPC's jurisdiction and is of no help to the Commission here.

The pipeline rate cases[25] cited by the Commission in its brief, far from supporting its position, show that the crea-

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clude that the parties in the proceeding failed to argue the issue to the court.

This apparent oversight is understandable in light of the history of *SoLa II*. The rate structure approved by the Fifth Circuit began as a proposed settlement offer, *id.* at 19, which was ultimately adopted *in toto* by the Commission as a decision on the merits. *Id.* at 22. The rate for transportation of liquids was a small, arguably insignificant part of this rate structure. The parties in that case, which included Mobil Oil Corp., were undoubtedly less concerned than here with invalidating the rates for liquids and simply failed to notice or argue the jurisdictional issue.

[23] 390 U.S. 747, 820 n. 111 (1968).

[24] 406 U.S. 621 (1972).

[25] *City of Detroit* v. *FPC*, 97 U.S. App. D.C. 260, 269-71, 230 F.2d 810, 819-21 (1955), *cert. denied*, 352 U.S. 829 (1956); *Cities Service Gas Co.* v. *FPC*, 155 F.2d 694, 703 (10th Cir.), *cert. denied*, 329 U.S. 773 (1946); *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 307-308 (4th Cir.), *rev'd on other grounds*, 320 U.S. 591 (1943).

tion of rates over liquids is not the proper way to protect the gas consumer's interests, rather that the method of allocation of costs is satisfactory. None of these cases endorse the establishment of mandatory minimum rates for services over which the Commission has no jurisdiction.

The Commission essentially argues that it has jurisdiction here because the transportation of liquids is part of a total transaction that includes the transportation of natural gas. As this court has noted, however, "Congress did not give the FPC *carte blanche* to take whatever action it might consider appropriate in furtherance of" the objectives of the Act.[26] The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a "total transaction" of which another part happens to be subject to the FPC's control. The Commission has jurisdiction over the *production* of natural gas.[27] Acceptance of the FPC's argument would eventually lead to the conclusion that the Commission has and must exercise jurisdiction over the production of *oil* merely because oil and gas are ordinarily produced simultaneously from a single well. We expect the Commission would recoil from that logical extension.

The separable nature of gas and liquid transportation is quite obvious. Even the rates set by the Commission indicate the differing character of the activities—transportation rates for gases and liquefiables are expressed in "Mcfs," while rates for liquids are expressed in "barrels." The commodities differ in form, substance, metering, accounting, and all other incidents of distinct, separable commodities.

We do not ignore the need to assure that users of gas are not asked to pay for the transportation of a commodity they are not using. We recognize that the Commission

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[26] *Mobil Oil Corp.* v. *FPC*, 149 U.S.App.D.C. 310, 463 F.2d 256, *cert. denied*, 406 U.S. 976 (1972).

[27] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

must have some mechanism to assure that injustice does not result. The proper method is not, however, to extend the Commission's jurisdiction beyond that granted by Congress.

We are not confronted with a case where the Commission has demonstrated that rate jurisdiction over liquids is necessary to preserve its rate jurisdiction over natural gas. Under the statute as written, in the last analysis such assertion would have to be presented to Congress, but we think it important to bring out that the necessity has simply not been demonstrated on this record. The Commission has never stated why it concludes that the well-established practice of allocation of costs between liquids and gas has suddenly become inadequate. The Commission indicates that some kind of national approach is necessary. But there could be a system of allocation that is national in its coverage and reach. Under a properly administered allocation system, the service attributable to other commodities would not be allocated to the cost of gas. Under this method the dichotomy contemplated by the Act would be preserved, just as it has been in the numerous prior cases under this statute in which similar questions have arisen.[28]

For the foregoing reasons, we set aside Order No. 449 insofar as it covers the transportation of liquids. It is clear, however, and appellant does not contest, that the Commission has the authority to set rates for the transportation of liquefiable hydrocarbons. We must, therefore, inquire further into the lawfulness of those rates as established in this proceeding.

IV. *Rates for the Transportation of Liquefiable Hydrocarbons*

A. *Requirements of the Administrative Procedure Act*

Petitioner argues that the administrative procedures followed by the Commission in setting the rates under review

[28] *See, e.g.*, cases cited footnote 25, *supra*.

were so defective that they must be held invalid. The contention is that the Natural Gas and Administrative Procedure Acts require that the Commission engage in so-called "formal rule-making" as described in sections 556 and 557 of the APA.[29] Under these sections parties have the right to submit evidence and engage in some form of cross-examination; this is essentially rule-making using adjudicative procedures.

On the other hand, the FPC believes that it may proceed in an informal manner under section 553 of the APA.[30] These informal procedures require only that notice of the proposed rule be given in the Federal Register and that interested parties be permitted to "comment" on the rule.

The positions taken by the parties present the court with a mutually exclusive, either-or choice: if the Commission may use the informal procedures of section 553, then arguably the procedures used to set the rates under review were adequate; if the FPC may only make rates by using the formal procedures of sections 556 and 557, then the procedures used here were inadequate and the orders under attack must be set aside.

We decline to hold that the Commission is required by either statutory language or the Constitution to observe strictly the procedures outlined in sections 556 and 557 of the APA.[31] Although the Commission is not required to proceed with the rigor urged by petitioner, for other reasons we believe that the procedures employed here were inadequate and the rate orders under attack must be set aside.

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[29] 5 U.S.C. §§ 556 and 557 (1970).

[30] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970).

[31] Administrative Procedure Act §§ 7 and 8, 5 U.S.C. §§ 556 and 557 (1970).

The two extreme positions taken by the opponents in this case were founded upon a misconception of the separate and composite requirements of the Administrative Procedures Act, the Natural Gas Act, several opinions of this court and the Supreme Court's opinions in *Morgan* v. *United States* and *United States* v. *Florida East Coast Railway Co.*[32] Within the baroque structure created by these converging elements, there is admittedly some room for confusion. With a full realization that our efforts may not be altogether successful, we first turn to an elucidation of this complex and oftentimes puzzling area of the law.

1. *Formal Rule-Making Under the APA*

Petitioner argues that the formal procedures outlined in sections 556 and 557 of Title 5 U.S.C. should have been followed in setting the disputed rates. These formal procedures by their terms, however, are only required when the substantive statute (in this case the Natural Gas Act) requires that rules be made "on the record after opportunity for an agency hearing."[33] The Natural Gas Act does not provide on its face that rates will be made by an "on the record" proceeding. Taking the language of the APA and the Natural Gas Act together, but nothing else at this time, the strictures of sections 556 and 557 need not be followed here.

There is some danger in according too much weight to magic words such as "on the record." However, the Supreme Court's recent opinion in *United States* v. *Florida East Coast Railway Co.*[34] emphasized the importance of this phrase and virtually established it as a touchstone test of when section 556 and section 557 proceedings are required.

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[32] 298 U.S. 468 (1936) and 304 U.S. 1 (1938); —— U.S. ——, No. 70-279 (22 Jan. 1973).

[33] 5 U.S.C. § 553(c) (1970).

[34] —— U.S. ——, No. 70-279 (22 Jan. 1973).

The Interstate Commerce Commission statute under which the rates were promulgated in *Florida East Coast* required that there be a "hearing," but did not specify what sort of "hearing" should be held.[35] Most significantly, the ICC statute did not require that they be made "on the record."

The fact that a "hearing" was required was accorded no particular significance by the Court. This was interpreted as merely a statement of Congressional intent to require a hearing of some sort—either formal or informal —but was of no help in determining which kind. In addition, the Court found nothing in the legislative history that indicated that Congress intended the ICC to use formal procedures in this context.[36] Finally, the Court disposed of the argument that the Constitution required more exhaustive proceedings than had been accorded.[37]

Although the situation in *Florida East Coast* is distinguishable in several critical aspects from the instant case,[38] we believe it is controlling on the narrow point of whether the Commission must rigorously comply with the standards of sections 556 and 557 of the APA. The Natural Gas Act does not on its face require that rates be made "on the record" and we can find nothing in the Act's legislative

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[35] Interstate Commerce Act § 1(14)(a), 49 U.S.C. § 1(14)(a) (1970).

[36] —— U.S. at ——, No. 70-279, slip op. at 8.

[37] *Id.* at 21-22. Distinguishing between an agency's legislative and adjudicative functions, the Court determined that this was a situation in which the agency was creating a generally applicable rule rather than adjudicating factual disputes. The Court then concluded that under the relevant cases the Constitution had never required exhaustive judicial-style hearings, when a prospective quasi-legislative rule was promulgated in a situation not involving significant factual disputes.

[38] Text accompanying footnotes 80-83, *ante*.

history indicating that Congress felt that "on the record" rule-making, with all its procedural formalities, was required in this case.

2. *Informal Rule-Making*

We conclude that the FPC need not employ the precise procedures set forth in sections 556 and 557 of the APA. It does not follow, however, that the Commission may proceed with only the guidance of the less rigorous standards of section 553.[39] The Commission's position assumes that there are only two permissible forms of procedures cognizable under the APA that the two are mutually exclusive, and that their existence precludes the use of any other procedures that lie between them.[40] This rigid interpreta-

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[39] From the record it appears probable that the FPC did not even comply with the minimal requirements of section 553. Section 553 requires in part that notice shall be given of the "terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1970). In this case the parties were informed that the proceedings would be to consider the advisability of establishing a general policy of allocating costs to liquids and liquefiables. *See* footnote 3, *supra*, and accompanying text. The resulting rule established specific rates for these commodities. *See* footnote 10, *supra*, and accompanying text. Although there is certainly no requirement that the resulting rule conform precisely to that which is proposed, there is a serious question whether sufficient notice was given in this case.

[40] This argument in syllogistic form is as follows. Congress established two types of rule-making procedures in the APA —informal under section 553 and formal under sections 556 and 557. Sections 556 and 557 proceedings are only required when the regulatory statute calls for "rulemaking on the record." Since on the record proceedings are not called for in this situation, section 556 and 557 proceedings are

tion of what is permitted and requred under the APA is inaccurate, as it would not meet the multifarious situations arising before the numerous agencies charged with the administration of various and varied statutes.

Flexibility in fitting administrative procedures to particular functions is critically important in evaluating the APA and has been a dominant theme in a number of opinions by this court. No court, to our knowledge, has ever treated the explicit language of section 553 on the one hand and sections 556 and 557 on the other as expressing every type of procedure that might be called for in a particular situation.

The entire thrust of our opinion in *City of Chicago* v.

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unnecessary. Therefore, the informal procedures outlined in section 553 must be adequate.

The APA itself makes no such rigid demarcation between "formal" and "informal" rule-making as both parties here seem to argue. In *Florida East Coast* Justice Rehnquist pointed out:

> [I]t cannot be doubted that a statute that requires a "hearing" prior to rulemaking may in some circumstances be satisfied by procedures which meet only the standards of § 553. The Court's opinion in *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964), supports such a broad definition of the term "hearing."
>
> Similarly, even where the statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection *d* provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." Again the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.

Slip op. at 17.

FPC [41] was that artificial distinctions based upon the language of the APA should be avoided in determining what procedure should be followed. There we had before us a dispute regarding the type of procedures called for, in effect the reverse of the situation here:

> Petitioner claims that the proceeding was intended by the Commission, and understood by the parties, to be an "adjudicatory" one but that the Commission impermissibly changed it to a rule-making proceeding at the last minute....
>
> In many cases, it is unnecessary, and even unwise, to classify a given proceeding as either adjudicatory or rulemaking. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or the other. Moreover, obsession with attempts to place agency action in the proper category may often obscure the real issue which divides the parties and requires our resolution.[42]

Our *City of Chicago* opinion also emphasized that strict adherence to the explicit dictates of the APA was not the primary test of the appropriateness of a particular type of procedure. Rather, the "primary objective is the acquisition of information which will enable the Commission to carry out effectively the provisions of the Natural Gas Act." [43] To this end the Commission should "realistically tailor the proceedings to fit the issues before it, the formation it needs to illuminate those issues and the manner of presentation...." [44]

Support for this flexible interpretation of the APA may be observed in other areas of administrative law. In *Amer-*

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[41] 147 U.S. App. D.C. 312, 458 F.2d 731 (1971, *cert. denied*, 405 U.S. 829 (1972).

[42] *Id.* at 739.

[43] *Id.* at 744.

[44] *Ibid.*

ican Airlines v. *CAB*,[45] this court sitting *en banc* articulated this approach in approving procedures that were more rigorous than those of section 553 and less rigorous than those of sections 556 and 557:

> This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress. Gonzales v. Freeman, 118 U.S. App. D.C. 180, 334 F.2d 570 (1964); Pollack v. Simonson, 121 U.S. App. D.C. 362, 350 F.2d 740 (1965).[46]

In considering the appropriateness of procedures we bear in mind this court's observation in *American Airlines* that "[i]t is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience."[47]

We quite recently had occasion to apply these general principles in *International Harvester Co.* v. *Ruckelshaus*,[48] in which we considered what procedures were required in promulgating emissions control standards for automobiles. We did not resolve the issue by forcing the problem into the artificial cubbyholes of "informal" versus "formal." Rather, we examined what Congress intended to be accomplished when it called for "hearings" on pollution controls. We emphasized the procedures in fair contemplation required of the agency, in order to permit the reviewing court to conduct the kind of judicial review contemplated by Congress. The court concluded that emissions standards involved a determination of general policy of the sort amen-

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[45] 123 U.S. App. D.C. 310, 359 F.2d 624 (1966) (*en banc*).

[46] *Id.* at 318, F.2d at 632.

[47] *Id.* at 319, F.2d at 633.

[48] —— U.S. App. D.C. ——, —— F.2d ——, No. 72-1517, slip op. at 20 (10 Feb. 1973).

able to legislative type hearings. We held these general policy questions to be inextricably bound up with relatively specific factual issues of the sort that ordinarily require testing by cross-examination and other adjudicatory procedures.

The court rejected, however, the argument that there was a general right to cross-examine witnesses to the same extent that might be permissible if the action were before a court of law. We reasoned that such a broad right would make the proceedings unduly cumbersome and, far from advancing the public interest, might actually inhibit the attainment of the ultimate goal to which the statute was directed.[49] We concluded that permitting the submission of pre-screened written questions would achieve the dual goals of adequately illuminating factual disputes while not unduly burdening the process with adjudicative procedures inappropriate for the specific job required under the statute. We did indicate that a limited right of cross-examination was to be provided with respect to certain types of issues that required cross-examination for fair ventilation.

The approach employed in *International Harvester* and other cases is entirely consistent with the language of the APA. The statute has long been interpreted as permitting an agency to provide more than the bare minimum described

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[49] *Id.* at 22. Cf. Judge McGowan's statement in *Automotive Parts & Accessories Association* v. *Boyd*, 132 U.S. App. D.C. 200, at 207, 407 F.2d 330, at 337 (1968), that what is required is not "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings," but a "concise general statement of . . . basis and purpose" which will enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." In *Public Service Commission of New York* v. *FPC*, —— U.S. App. D.C. ——, 467 F.2d 361 (29 Mar. 1972), we found this test appropriate for the objectives of FPC action there; we do not so find here.

in section 553.[50] By like token, the formal proceedings of sections 556 and 557 do not require that full adjudicative methods be employed in every situation that may fall within its ambit. Thus, subsection (d) of section 556 provides that "in rule making . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."[51] Even a superficial reading of the APA's legislative history shows that, far from wanting to force agency procedures into narrowly defined categories, Congress was primarily concerned with fitting procedures to agency functions.[52]

The APA may be viewed as providing the outer boundaries of administrative procedures. Congress has determined that the procedures outlined in section 553 will be the minimum protections upon which administrative action may be based, according to interested parties a simple notice and right to comment. At the opposite end of the spectrum lie the requirements of sections 556 and 557. Those may be viewed as representing the highest degree of administrative protection that Congress believed would be necessary to protect interested parties. There is no reason, however, to conclude that Congress in establishing these limits intended to preclude all the possible formulations

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[50] *City of Chicago* v. *FPC*, 147 U.S.App.D.C. 312, 324, 458 F.2d 731, 743 (1971), *cert. denied*, 41 U.S.L.W. 3635 (S. Ct., 5 June 1973). *Cf.* Justice Rehnquist in *Florida East Coast*, slip op. at 12, n. 6: "Moreover, since any agency is free under the Act to accord litigants appearing before it more procedural rights than the Act requires, the fact that an agency may choose to proceed under §§ 556 and 557 does not carry the necessary implication that the agency felt it was required to do so."

[51] 5 U.S.C. § 556(d) (1970).

[52] S. Rep. No. 752, 79th Cong., 1st Sess. 4-5 (1945) (reprinted in Administrative Procedure Act—Legislative History, 79th Congress, 1944-46, at pp. 191-192).

that might lie in between the two extremes. To so hold would run directly counter to several opinions of this court that have approved or required procedures that contained elements of both section 553 and section 556 and 557 proceedings, but fully conform to neither.[53]

To permit flexibility under the APA does not, however, mean that agencies are granted *carte blanche* to proceed in any way they may see fit. Flexibility is not synonymous with uncontrolled discretion. Furthermore, the FPC may have interpreted this court's prior comments on the subject as permitting whatever the agency thought proper so long as it did not fall beneath the minimum of section 553. This unfortunate reading may have been the basis for the Commission's belief that the superficial hearings, "conferences," accorded in this case were adequate.

Such a reading of the Act and our opinions is simply incorrect. It is true that the nature of a particular regulatory scheme may permit or even require less than the formal procedures of section 556 and 557. It is equally true, however, that an examination of the purposes and provisions of the substantive statute being administered may require that more than the comparatively feeble protections of section 553 of the APA may be called for. A final determination of what procedures are appropriate here must turn upon an analysis of the regulatory scheme envisioned by Congress in passing the Natural Gas Act and a determination of what is necessary to effectuate the policies of this regulatory statute.

B. *Procedures Required Under the Natural Gas Act*

1. *Section 16 and Administrative Flexibility*

In promulgating the rates under review the Commission stated that it was acting pursuant to sections four, five and sixteen of the Natural Gas Act. Sections four and five are

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[53] *See* footnotes 41-49, *supra*.

the sections which grant authority to set "just and reasonable" rates.[54] Section sixteen allows the Commission to perform "any and all acts"—including making orders and rules—that are "necessary and appropriate to carry out the provisions of [the Natural Gas Act]."[55] The Commission argues that section sixteen permits it great latitude in the procedures it will follow in setting rates under sections four and five.

In essence, the Commission reads section sixteen as performing the same function with regard to the Natural Gas Act that the "necessary and proper" clause performs in the United States Constitution. Accordingly, if something is required by another provision of the Natural Gas

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[54] *See* footnote 1, *supra*.

[55] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. Natural Gas Act § 16, 15 U.S.C. § 717o (1970).

Act, section sixteen permits that which is "necessary and appropriate" to get the job done. The Commission has determined the procedures "necessary and appropriate" here to be the minimal requirements of section 553 of Title 5 U.S.C.—*i.e.*, public notice and an opportunity to comment. These simple procedures are "necessary and appropriate" in part because the Commission feels it would be unduly burdensome to permit more elaborate inquiry into the matter.

The Commission's approach goes too far. A more tempered and balanced approach would accord reasonable significance to section 16, without making it a *carte blanche*. "Such 'necessary or appropriate' provisions do not have the same majesty and breadth in statutes as in a constitution, . . . [but] they are not restricted to procedural minutiae, and they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." [56]

Support for the Commisison's expansive reading of the meaning of section sixteen is allegedly found in the *Permian Basin Area Rate Cases*.[57] There the Supreme Court approved procedures by which uniformly applicable rates were set for all the gas producers in a particular area. This form of rate-making was not mentioned in either the Natural Gas Act or the Administrative Procedure Act; it is doubtful that the framers of either piece of legislation ever conceived of such a procedure.

In the course of its decision the Court recognized that a case-by-case method of rate-making had seriously overburdened the Federal Power Commission, and that the

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[56] *Niagara Mohawk Power Corp.* v. *FPC*, 126 U.S. App. D.C. 376, 381, 379 F.2d 153, 158 (1967).

[57] 390 U.S. 747 (1968).

entire regulatory process was in danger of collapsing because of its inability to perform its statutory duty to set just and reasonable rates for gas production. In the face of this overwhelming task the Court agreed that strict adherence to traditional forms of rule-making must give way to the exigencies of the situation. Recognizing that it was an experiment and might not be the final answer to the problem, the Court approved the area-wide method of setting rates. The entire tone of the opinion evinces a tolerance for flexibility and experimentation in administrative process.

In the course of its discussion the Court referred to section sixteen as supporting the position that the Commission should be permitted substantial discretion in formulating procedures for the administration of the Act.[58] In a similar vein this court, in two recent opinions, has taken section sixteen as supporting the validity of administrative procedures that departed from established methods and that permitted substantially less elaborate safeguards than had previously been the case.[59] The FPC relies on this language as authority to deal with its problems, apparently in whatever manner it deems necessary or expeditious, so long as a slight bow in the direction of section 553 of the APA is made. This far-reaching interpretation of section sixteen seriously misconstrues both the nature of the provision and the import of court references to it.

First, it is significant that the Supreme Court, in the *Permian Basin Area Rate Cases,* did not hold the procedures under examination there to be valid *because of* any

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[58] *Id.* at 776 n. 40.

[59] *Mobil Oil Corp.* v. *FPC,* —— U.S. App. D.C. ——, ——, 469 F.2d 130, 138, (1972), *cert. denied,* 41 U.S.L.W. 3635 (S. Ct., 5 June 1973); *City of Chicago* v. *FPC,* 147 U.S. App. D.C. 312, 324, 458 F.2d 731, 743 (1971), *cert. denied,* 405 U.S. 829 (1972).

authority granted under section sixteen. Rather, the Court sought and found a justification for experimentation and flexibility in the *nature* of the regulatory scheme envisioned by Congress. The Court first isolated the purpose behind the passage of the Natural Gas Act. It then noted that it has long been the rule that "administrative authority must be measured in part by the purposes for which it was conferred . . ." and that statutory provisions must therefore be liberally construed.[60] The Court then concluded its analysis as follows:

> The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods. The Commission believes that the elements of such methods may be found in area proceedings. "[C]onsiderations of feasibility and practicality are certainly germane" to the issues before us. *Bowles* v. *Willingham, supra,* at 517. We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.[61]

At no point in its discussion did the Court rely upon section sixteen as a basis for its conclusion that area ratemaking was permisisble. It merely referred to section sixteen as giving "additional assistance" to a conclusion reached on the basis of its analysis of overall Congressional statutory intent and the nature of the regulatory process involved.[62] *Permian* does not construe section sixteen as a

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[60] 390 U.S. at 776.

[61] *Id.* at 777.

[62] *Id.* at 776 n. 40. Perhaps the final point to be made about *Permian* is the simple one that it was an approval of area ratemaking, and not a contraction of procedures. Permian's record was compiled on the basis of essentially adjudicatory procedures. All that the Court was doing was

grant of additional authority. At most, the Court reads the provision as being designed to assure that the Commission will be able to perform the functions granted under the substantive portions of the Act.

In a recent decision of this court Judge Tamm likewise interpreted section sixteen in this limited fashion:

> The Commission asserts for the first time on appeal that it relies upon Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act as authority for Order 427. Although we view this as "*post hoc* patchwork," we have considered and rejected the argument. Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented "consistently with the provision and purposes of the legislation," and "that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the act." *These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act.*[63]

The opinions of this court in *City of Chicago* v. *FPC*[64] and more recently in *Mobil Oil Corp.* v. *FPC*[65] are not to

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taking into account the adjustments that were appropriate in adjudicatory procedures when the proceeding's subject matter was broadened from the issue of rates for an individual company to the context of rates for all producers in an area.

[63] *New England Power Co.* v. *FPC*, —— U.S. App. D.C. ——, ——, —— F.2d ——, ——, No. 71-1539, slip op. at 11-12 (15 Aug. 1972), *cert. granted*, 41 U.S.L.W. 3608 (S. Ct., 15 May 1973) (emphasis added).

[64] 147 U.S. App. D.C. 312, 458 F.2d 731 (1971), *cert. denied*, 405 U.S. 829 (1972).

[65] —— U.S. App. D.C. ——, 469 F.2d 130, (1972), *cert. denied*, 41 U.S.L.W. 3635 (S. Ct., 5 June 1973).

the contrary. *City of Chicago* clearly did not rely upon section sixteen as a *source* of authority for the procedures involved there. Indeed, much of the discussion of section sixteen is in the context of a discussion of the need to test procedures by the nature of the regulatory function commanded by Congress. The language in *Mobil* is even less relevant since rate-making was not involved. There the Commission had established a *temporary* rule designed to maintain the status quo pending the outcome in conventional area rate proceedings being conducted pursuant to sections four and five of the Act. Thus the Commission was using section sixteen to preserve its rate-making authority by establishing a moratorium; it was not using the vague language of that section to make rates. Such an implementing rule, *i.e.*, a writ in aid of jurisdiction to be exercised under another section of the statute, is precisely what section sixteen was designed to permit. The court did not intimate that the rudimentary procedures approved there would be adequate in setting rates—indeed, the inference is to the contrary.[66]

We conclude that section sixteen standing alone does not permit the sketchy procedures employed in originally setting the rates currently under review. The substantive provisions of the Act contemplate certain procedures, as incident to the functions provided. The range of permissible procedures must be derived from these sections, sections like sections 4 and 5 of the Natural Gas Act, and the functions they describe. Section 16, which uses a broad generality of "necessary and appropriate" that is not rooted in a function, cannot enlarge the choice of permissible proce-

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[66] The court discussed the rate ceilings with the understanding that they were intended to be in effect only until permanent rates were set by traditional methods. —— U.S. App. D.C. at ——, 469 F.2d at 140. Cf. 28 U.S.C. § 1651.

dures beyond those that may fairly be implied from the substantive sections and the functions there defined.

2. *Sections Four and Five of the Natural Gas Act*

Any administrative proceeding designed to set rates for a large number of separate enterprises possesses elements of both a legislative policy determination and an adjudicative resolution of disputed facts.[67] Although these distinct elements are intertwined and necessarily exist simultaneously in any rate-making, one may predominate over the other. Rate-making always involves factual predicates; yet the facts relevant to rates in any given industry may be more or less well established. For example, if industry costs are well established, the rate-making process would consist primarily of policy judgments such as the fair rate of return or the desired level of safety; appropriate procedures for resolution of these policy disputes would not resemble adjudication. In contrast, if the rate of return policy was clear but the cost base uncertain, adjudication might be more appropriate. Congress could take into account the differences in these two type situations and require greater evidentiary support for factual findings in some instances than in others.

The degree of fact dispute resolution necessary in a particular proceeding is directly related to the degree of evidentiary support required by Congress in establishing a factual basis for a proposed rate. If a relatively high degree of evidentiary support is required in establishing a factual predicate, the rule-making procedures must be de-

[67] This court has specifically rejected the idea that an agency may avoid finding facts and having those findings reviewed by the courts by the simple expedient of characterizing a proceeding as "rule-making." *City of Chicago* v. *FPC*, 147 U.S. App. D.C. 312, 324-325, 458 F.2d 731, 743-744 (1971), *cert. denied*, 405 U.S. 829 (1972).

signed to create this. Thus, if we know the degree of evidentiary support required, this will indicate the type of procedures that Congress intended to be employed.

The Natural Gas Act explicitly states that factual determinations must be supported by "substantial evidence." [68] Unlike many other forms of rule-making, rate-making necessarily rests upon findings of facts.[69] The phrase "substantial evidence" is a term of art well recognized in administrative law. This requirement imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.[70] Substantial evidence as interpreted

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[68] The Natural Gas Act provides that "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 717r(b) (1970). The necessary implication is that if the findings are not supported by "substantial evidence" they will not be permitted to stand.

It is highly significant that this substantial evidence test is a part of the actual language of the Natural Gas Act. This indicates that Congress was particularly concerned with the degree of certainty required in establishing factual predicates in rate-making.

[69] As illustrated, rate-making by whatever method necessarily involves finding facts. There can be no dispute that Congress in passing the Natural Gas Act expected that rates would be tested by this substantial evidence standard. This court has specifically so held. *City of Chicago* v. *FPC*, 147 U.S. App. D.C. 312, 325, 458 F.2d 731, 744 (1971), *cert. denied*, 405 U.S. 829 (1972). Every other case in which the factual basis of an FPC rate has been challenged has assumed that the substantial evidence test is the proper method of evaluating the factual predicate. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 816, 824, 827 (1968); *Placid Oil Co. v. FPC* (*SoLa* II), —— F.2d ——, No. 71-2761, slip op. at 1 (5th Cir., 16 Apr. 1973).

[70] An indication of the nature of the procedural requirements imposed by the "substantial evidence" test may be

by the Supreme Court "is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[71] The Court in a later opinion explained further that "it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[72] It has also been established that in determining whether facts are supported by substantial evidence the entire record must be considered and not merely the evidence tending to support the finding.[73]

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gained from examining the use of that phrase in the Administrative Procedure Act. It provides that:

> . . . The reviewing court shall—
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> . . .
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> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
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> . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewable on the record of an agency hearing provided by statute.

5 U.S.C. § 706(2)(E) (1970).

This language indicates that Congress expected that the substantial evidence test would be used in conjunction with formal procedures under sections 556 and 557. Thus Congress, in using the phrase "substantial evidence" in another statute, undoubtedly thought that similar procedures would be used in creating this evidentiary record. This supports the conclusion that the requirement of facts based on substantial evidence mandates greater procedural protection than those accorded under section 553 of the APA.

[71] *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

[72] *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

[73] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

From this outline of the meaning of "substantial evidence," we can perceive the sort of procedures required. Clearly some evidence supporting the FPC's finding must be in the record. *More importantly for our purposes, the rule that the "whole record" be considered—both evidence for and against—means that the procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others.* This process of introduction and criticism helps assure that the factual basis of the FPC rates will be accurate and provides the reviewing court with a record from which it can determine if the agency has properly exercised its discretion.

Our interpretation of the significance of the "substantial evidence" requirement is supported by the *Attorney General's Manual on the Administrative Procedure Act.*[74] This Manual was prepared more or less contemporaneously with the adoption of the Act and has been described by this court as being an "authoritative source" of information concerning the APA.[75] Indeed, the Manual went even further than this court and interpreted the "substantial evidence" requirement as meaning formal hearings under sections 556 and 557:

> Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court "a *transcript of the record* upon which the order complained of was entered," and the Commission's findings of fact *"if supported by substantial evidence,*

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[74] United States Department of Justice (1947).

[75] *Siegel* v. *Atomic Energy Commission*, 130 U.S. App. D.C. 307, 314, 400 F.2d 778, 785 (1968).

shall be conclusive." It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates "on the record after opportunity for an agency hearing." See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285).[76]

We have, of course, concluded that full section 556 and 557 proceedings are not required in the case at bar. The Attorney General's conclusion is, however, understandable. Clearly the existence of the "substantial evidence" requirement in the Natural Gas Act demands that facts be determined and reviewed with a greater degree of certainty than is possible under the "informal" methods of section 553 of the APA. The Attorney General simply concluded that section 553 was inadequate; the only obvious, easily referenced alternative in the APA was full adjudicative proceedings under sections 556 and 557, hence the stiffer test was stated as providing the appropriate standard to which to repair, a conclusion with which we do not agree as applied to this case. The fundamental principle behind the statement in the Manual is what we find important here: in any administrative proceeding, the type of procedure required is related and proportionate to the degree of evidentiary support required for the agency's decision.

Our conclusion that the "substantial evidence" requirement necessitates some sort of adversary, adjudicative-type procedures is made more obviously necessary by considering the record in this case, such as it is. The FPC admittedly made findings of fact here regarding transportation costs and points to evidence which it claims supports the accuracy of these facts.[77] It is clear, however, that none of the interested parties knew that this evidence—which was taken from a number of different sources—was to be the basis for the Commission's action. Consequently, no one

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[76] *See* footnote 74, *supra*, at 33.

[77] Brief for Federal Power Commission at 40.

was able to introduce evidence in opposition, criticize the Commission's position, or point out flaws by questioning the validity of its sources. As the record stands, in reviewing the Commisison's action we are unable to decide whether its factual determinations are supported by substantial evidence. Much of the evidence appears possibly suspect, we have no way of knowing from the record whether the figures are valid.[78] There is no evidence in the record except that which the Commission has chosen to include to support its position.[79] "Substantial evidence," the test of the Natural Gas Act, requires the consideration of the "whole record," and the whole record should contain sufficient un-

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[78] In establishing the rates under review the Commission used data relevant to only ten pipelines out of 116, without any showing that these were typical or representative. It also appears from the record that this data was not matched as to test year, and yet the Commission gives equal weight to all the figures used without taking into account variances that might occur between years.

Mobil also contends that certain of the costs used by the Commission in formulating the rates had later been found to contain excessive amounts of depreciation expenses and that certain figures employed by the Commission have since been found to be overstatements of costs. Brief for Mobil Oil Co. at 30-31. Due to deficiencies in the record, however, we are unable to evaluate fully these contentions. This points up the basic inadequacy of the record before us and the procedures used in compiling it.

[79] Our inability here is in marked contrast to the situation in the recent area rate decision rendered in *Placid Oil Co.* v. *FPC*, —— F.2d ——, No. 71-2761 (5th Cir., 16 Apr. 1973). In that situation the court was given a full record with which to judge the agency's action. In another recent case the Fifth Circuit explicitly refused to speak to the issue of whether informal rule-making procedures could be used to set rates. *See Other Southwest Area Rate Case v. F.P.C.* (OSWA I), —— F.2d ——, No. 72-1114, slip op. at 22 n.23 (5th Cir., 8 June 1973).

impeachable—or at least persuasive—evidence to support the conclusion the Commission has reached if its action is to be sustained on appeal.

Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. A "whole record," as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.

The Supreme Court's recent decision in *United States* v. *Florida East Coast Railway*[80] in no way diminishes the validity of our conclusion that the "substantial evidence" test requires more exhaustive procedures than those in section 553 of the APA. As we have previously noted, in that case the Supreme Court upheld rates set by the ICC under informal section 553 procedures, but the ICC statute does not require that factual determinations be supported by substantial evidence. While stating that the rates were based upon "factual inferences," the Court concluded that the statute did not mandate inquiry into the substantiality of the evidentiary basis, since the factual inferences were not used "in adjudicating a particular set of disputed facts."[81]

The ICC statute provides that "the Commission shall give *consideration* to" various aspects of the railroad indus-

[80] —— U.S. ——, No. 70-279 (22 Jan. 1973).

[81] —— U.S. at ——, slip op. at 22.

try.[82] The test then would be whether the Commission "considered" everything it was supposed to in making its determination. If the reviewing court determines that the ICC has "considered" everything that it should, it will inquire no further.[83] This "consideration" test obviously permits the ICC much greater leeway and requires much less certainty than does the "substantial evidence" test. It is entirely appropriate that the procedures for "consideration" of evidence would employ almost none of the dispute resolution procedures ordinarily associated with adjudication. Under these circumstances prevailing in *Florida East Coast,* the informal procedures could be more than adequate.[84]

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[82] —— U.S. at ——, slip op. at 11.

[83] It is clear that under the ICC statute the Supreme Court was not obligated to apply the substantial evidence test to the rates under consideration. Unlike the Natural Gas Act, the ICC statute does not contain a requirement that factual determinations be tested by substantial evidence; the APA only requires facts to be tested by substantial evidence if the proceedings are required to be conducted under sections 556 and 557 of the APA. *See* footnote 70, *supra.* Since the Supreme Court concluded that sections 556 and 557 did not apply, the APA requirement was not applicable. Thus, neither the ICC statute nor the APA required that the substantial evidence test be used. In the case at bar the decisive distinguishing factor is that the Natural Gas Act instead of either the Interstate Commerce Act or the APA provides the procedural standard.

[84] At no point in its 22-page opinion did the Court even mention the substantial evidence test. It is clear from the following language that the Court evaluated the procedures on the basis of whether the ICC had fully "considered" all the factors required under the statute:

> The parties had fair notice of exactly what the Commission proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission. The final order of the Commission

In both *Florida East Coast* and *Morgan* v. *United States* [85] the critical factor as to proper procedure was derived from the substantive statute itself. In *Morgan* Chief Justice Hughes referred to "the 'full hearing' required by the statute" and then said, "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied." [86]

Likewise, in *Morgan* the required procedure was derived from the nature of the responsibilties with which the agency was charged. Chief Justice Hughes inquired, "What is the essential quality of the proceeding under review,

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indicates that it gave *consideration* to the statements of the two appellees here. Given the "open-ended" nature of the proceedings, and the Commission's announced willingness to *consider* proposals for modification after operating experience had been acquired, we think the hearing requirement of § 1(14)(a) of the Act was met. *Id.*, slip op. at 17 (emphasis added).

It is not surprising that Congress might be satisfied with a lesser degree of certainty in ICC factual determinations than in those of the FPC. The ICC has traditionally been permitted to base its determinations on relatively imprecise dispute resolution procedures. *New England Division Cases*, 261 U.S. 184, 196-197 (1923). It may well be that cost factors are sufficiently uniform in the areas of the economy under the ICC's jurisdiction so that procedures designed to produce precise factual dispute resolutions would be a waste of time. Whatever the Congress' intention with regard to the ICC, however, it has clearly chosen to require more of the FPC.

[85] 298 U.S. 468 (1936). The case was again before the Supreme Court in *Morgan* v. *United States*, 304 U.S. 1 (1938). In *Florida East Coast* the Supreme Court distinguished *Morgan* for reasons not applicable here.

[86] 298 U.S. at 477.

and what is the nature of the hearing which the statute prescribes," and then answered:

> It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is *legislative* and gives to the proceeding its distinctive character [citation omitted], it is a proceeding which by virtue of the authority conferred has special attributes. . . .
>
> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.[87]

So here in the case at bar. The Natural Gas Act term "substantial evidence" smacks of a judicial proceeding, but as we have made clear, we pin nothing on categorization by "rule-making" or "adjudication," nor by "formal" or "informal," and neither did the Supreme Court in *Morgan* when it used *both* terms "legislative" and "quasi-judicial." What is important and decisive is the essential quality of the proceeding under review.

We recognize that the Tenth Circuit in its recent opinion in *Phillips Petroleum Co.* v. *FPC*[88] has specifically approved the use of section 553 procedures in establishing rates. With all due respect, we disagree with the two majority judges in *Phillips* in their construction of the breadth of discretion granted the Commission to

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[87] 298 U.S. at 480.

[88] *Phillips Petroleum Co.* v. *FPC*, —— F.2d ——, No. 71-1659 (10th Cir. 20 Feb. 1973).

formulate rules.[89] We agree with dissenting Judge Seth, who based his position in part on the failure of the procedures used by the Commission to create a record that would adequately support the factual findings and permit judicial review,[90] a factor which plays a large part in our decision here.

The defect we find in the Commission's procedures here, and the resulting inadequacy of the evidence, could be

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[89] The Tenth Circuit's conclusion was based upon its reading of sections 15 and 16 of the Natural Gas Act, the Supreme Court's opinion in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and this court's opinion in *City of Chicago* v. *FPC*, 147 U.S.App.D.C. 312, 324-325, 458 F.2d 731, 743-744 (1971). We have considered all of these statutory and judicial authorities in this opinion and have concluded that the discretion granted the Commission to formulate rules is not as broad as the Tenth Circuit has interpreted it to be.

Contrary to the interpretation placed by the Tenth Circuit majority on *City of Chicago*, we did not there rely on section 16 as a source of authority for the FPC procedures there involved. And as our later decision in *New England Power* v. *FPC*, No. 71-1539, slip op. at 12 (15 Aug. 1972), states: "These sections [16] merely augment existing powers conferred upon the agency by Congress, they do not confer individual authority to act." Similarly, we find nothing in the Supreme Court's opinion in *Permian*, although it recognized the problems of the FPC and permitted area ratemaking, which dispensed with the creation of an adequate record for judicial review, which the Court certainly had in *Permian*. Furthermore, while the Tenth Circuit majority in discussing the APA specifically noted, "A more reliable test [for the record required in rule-making] is the congressional intent as contained in the specific statute" (slip op. at 25), yet nowhere did the Court discuss the "substantial evidence" standard of the Natural Gas Act, there and here involved.

[90] *Phillips Petroleum Co.* v. *FPC*, —— F.2d ——, No. 71-1659, slip op. at 10-11 of dissent (10th Cir., 20 Feb. 1973) (Seth, J., dissenting).

remedied by according the procedure described under sections 556 and 557 of the APA, but such complete adjudicatory procedures are not required.

What is required are procedures which will adequately test the Commission's factual determinations and create a record that will allow a reviewing court to examine the agency's actions. The procedures required are related and proportionate to the test of evidentiary support which the agency's decision must ultimately withstand.

Compliance with this standard could conceivably be achieved in a number of ways.[91] There must, however, be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses. In proceedings involving numerous parties, the Commission might find it expedient to screen the written interrogatories in the manner approved in *International Harvest Co.* v. *Ruckelshaus*.[92] It is also possible that the Commission could use evidence incorporated by reference from other proceed-

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[91] It is not, of course, for this court to make rules governing the procedures to be employed in FPC rate-making. Our comments here are presented by way of illustration. Whatever innovations the FPC may attempt, we believe that sound administrative practice demands that a more accurate record of proceedings be kept than was done in this case. The minutes provided this court are at best an outline of what actually occurred. This flaw is totally unnecessary and could easily have been remedied by simply preparing a transcript of the proceedings.

[92] *See* footnote 48, *supra*, and accompanying text. Such submission would not be mere comments, but rather would constitute a type of written cross-examination.

ings.[93] But whatever procedure is followed, it must assure that the Commission has a substantial evidentiary basis for its findings and it must provide the court with an adequate record on review.

V. *Conclusion*

We hold that the Federal Power Commission does not have jurisdiction to establish rates for the transportation of liquid hydrocarbons. We further hold that as to the

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[93] It is possible that evidence introduced and tested in a separate proceeding could be relevant to a rate-making subsequently before the Commission. Such evidence, under some circumstances, could conceivably be incorporated into a rate-making without prejudicing the parties. For example, evidence regarding costs in a particular area could be incorporated into a record without requiring that it be submitted and tested by cross-examination (or whatever method is being employed) a second time. But in any situation in which the Commission wishes to incorporate evidence from another proceeding, it must give the interested parties notice and an opportunity to comment on such evidence. This adoption by reference would have to include *all* the evidence on a particular point—not just that which supports the Commission's conclusions. The Commission would not be free to incorporate as evidence mere conclusions reached by the Commission in other proceedings.

By like token, the Commission would not be free to adopt factual assertions (such as settlement offers) which had not been subject to examination and testing by opposing parties. One of the most disturbing matters in the case at bar is that the very pipeline summary cost data, originally put forward as underpinning for a settlement proposal but relied on by the FPC here (App. 52) and in *Placid Oil, supra,* was in 9 out of 10 instances held too high by the Commission itself in later individual proceedings, as asserted in Mobil's brief (pp. 30-31) and admitted by the FPC in oral argument. So the FPC produced opposite results from the same data in different proceedings; twice the FPC credited the data, once the FPC discredited the data; Mobil was never given the opportunity to discredit the data.

Commission's action in regard to liquefiable hydrocarbons the cause must be remanded to the Commission for further proceedings. For the guidance of the Commission we summarize our reasons:

1. What started out as a general policy rule-making proceeding, for which the notice given by the Commission was probably adequate, was allowed to slide over into a proceeding fixing specific mandatory rates in which the required procedures, beginning with the notice of what was to be ultimately done by the Commission, were inadequate.

2. Even if jurisdiction had been properly asserted by the Commission over liquids, and even if we were to agree with the majority's rationale in *Phillips*[94] as to the adequacy of informal rule-making to set rates, the lack of fair notice and an adequate record on which the prices were set here would still require us to remand this case.[95]

3. The question as to why mandatory rates on liquefiables fixed by the FPC, instead of the previously satisfactory cost allocation attributable to both liquids and liquefiables, are now necessary was never faced squarely certainly it was never articulated. The decision as to why rate-making for liquefiables is now necessary, if it is, should be logically the first to be made by the FPC on this remand.

4. The procedures followed in the introduction and examination of "evidence" did not permit a testing of that evidence by procedures sufficiently adversary in nature to provide a reasonable guarantee of its reliability.

5. In the type proceeding on which the Commission eventually embarked, the standard of evidence which a

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[94] *See* footnote 88, *supra.*

[95] *See* text at pp. 6-11, and notes 10, 23, 39, 78 and 93.

reviewing court must have before it to sustain the agency's action is "substantial evidence" as called for by the basic statute here involved, the Natural Gas Act. The procedures required to develop this "substantial evidence" are not necessarily the strict adversary procedures of sections 556 and 557 of the Administrative Procedure Act, but, considering the ultimate decision which the Commission issued, should have embraced considerably more in the way of adversary procedures than those simple requisites of section 553 which were assumed sufficient here.

6. Owing to the inadequacies of the procedure followed and to the type of evidence relied upon by the Commission, we cannot find here in the whole record the substantial evidence necessary to sustain the Commission's action.

We therefore vacate the orders and remand the cause to the Federal Power Commission for further proceedings consistent with this opinion.

So Ordered.

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No. 73-91

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHEVRON OIL COMPANY, WESTERN DIVISION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–28) is reported at 475 F. 2d 842. The orders of the Federal Power Commission (Pet. App. 29–50) are reported at 46 FPC 43, 46 FPC 616, 46 FPC 1323, and 47 FPC 309.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1973. A petition for rehearing was denied on April 11, 1973 (Pet. App. 51–53), and the petition for a writ of certiorari was filed on July 10,

1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rulemaking procedures used by the Federal Power Commission in setting maximum rates for the sale of natural gas by producers in the Rocky Mountain area satisfy the requirements of the Due Process Clause of the Fifth Amendment, the Natural Gas Act, 15 U.S.C. 717, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*

STATUTES INVOLVED

Sections 4, 5, 15, 16, and 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717c, 717d, 717n, 717o, and 717r(b), and the pertinent provisions of the Administrative Procedure Act, as amended, 5 U.S.C. 551(4)–551(7), 553, 554, 556, 557, 559, and 706, are set forth at Pet. App. 54–68.

STATEMENT

A. BACKGROUND

The Federal Power Commission historically exercised its rate regulation functions under Sections 4 and 5 of the Natural Gas Act by conducting full adjudicatory proceedings on a company-by-company basis. After 1954, however, when this Court held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, that independent producers are "natural-gas compan[ies]" within the meaning of Section 2(6) of the Act, the Commission was nearly overwhelmed in its effort to regulate the rates of some 2,500 producers.

In 1960, it ceased examining separately each producer's costs of service and undertook instead to determine maximum producers' rates for each of the major producing areas. Its authority to set area-wide maximum rates was upheld by this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747. The Permian Basin rate proceeding was the first of several area rate cases in which the Commission held extensive evidentiary hearings.[1] Its experience in conducting these laborious proceedings, together with this Court's observation in *Permian* that additional measures might be necessary to achieve "a more expeditious and effective system of regulation" (390 U.S. at 772, n. 37), led the Commission in 1969 to initiate an informal *rulemaking* proceeding to set maximum rates in the Appalachian and Illinois Basin areas (34 Fed. Reg. 17341).[2] The Commission's decision was issued less than one year later (44 FPC 1112).

As the seriousness of the nation's natural gas shortage became more apparent, the Commission—in order to ensure "an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining

[1] There were nearly 400 parties to the Permian proceeding, and hearings lasted almost two years. The Commission's decision was finally issued about five years after the proceeding was commenced (see 390 U.S. at 755, n. 4).

[2] The Commission stated in its notice of proposed rulemaking that "Staff's report and the comments of interested parties, supplemented by conferences and such limited hearings as might be requested and shown to be necessary by the commenting parties, should enable the Commission to reach conclusions in this case and to arrive at a proper rate order without a full-blown evidentiary hearing" (34 Fed. Reg. 17341).

an industry structure capable of providing, and motivated to provide, service with its attendant risks" (35 Fed. Reg. 11638)—commenced a rulemaking proceeding to set nationwide "initial rates" for sales of natural gas under contracts dated after June 17, 1970.[3] In Order No. 435, issued in July 1971 as part of that nationwide proceeding, the Commission established such initial rates for the Rocky Mountain area (36 Fed. Reg. 13585).[4]

B. PROCEEDINGS BEFORE THE COMMISSION

On the same day that the initial rates for the Rocky Mountain area were established, the Commission com-

[3] A company may sell natural gas in interstate commerce only pursuant to a certificate of public convenience and necessity issued by the Commission under Section 7 of the Act, 15 U.S.C. 717f. Section 7(e) authorizes the Commission to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require." This Court held in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, that among the factors to be considered in determining the public convenience and necessity is the initial rate proposal of the applicant, which would govern the applicant's sale of gas until "just and reasonable" rates were approved under Sections 4 and 5 of the Act. An "initial rate" proceeding thus sets the rates at which the Commission would issue permanent certificates under Section 7 pending completion of proceedings under Sections 4 and 5. See, also, *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223; *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9.

[4] There are eight producing areas. The Rocky Mountain area includes portions of Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.

Order No. 435 is the subject of a petition for review pending in the Court of Appeals for the District of Columbia Circuit (*American Public Gas Association* v. *Federal Power Commission*, No. 71-1812).

menced by public notice a rulemaking proceeding to fix maximum "just and reasonable" rates for sales of natural gas by producers in the Rocky Mountain area under contracts dated before October 1, 1968 (Pet. App. 29–37). The notice stated that the Commission also proposed to determine whether the "initial rates" established by Order No. 435 for sales under contracts dated after June 17, 1970, should apply as well to contracts dated between October 1, 1968 and June 17, 1970.

All the large producers in the Rocky Mountain area and their pipeline purchasers were directed to file certain "flowing gas" cost and operational data for 1969.[5] The Commission's notice specified that the following rulemaking procedures would be employed upon receipt of the required data. First, the Commission staff would "composite and reconcile" the data and make the results available to all parties to the proceeding.[6] Each party would then have three weeks to file "[r]esponses in writing concerning this proposed rulemaking" (Pet. App. 32), and an additional two weeks to reply to the initial responses of other parties. The Commission would thereafter consider all the submissions before entering a final order. The notice also scheduled a "conference for the

[5] "Flowing gas," as used in this context, means gas that was being sold and transported in the interstate market pursuant to contracts dated prior to October 1, 1968.

[6] The producers and purchasers were made parties-respondent. In addition, the notice permitted "[a]ny interested person" to become a party by filing a notice of intention to respond to the proposed rulemaking (Pet. App. 30).

purpose of developing the issues and procedures to be followed in this proceeding" (Pet. App. 32), and permitted any party to request a further conference, which could be called at the discretion of the Commission staff.

Petitions for reconsideration or clarification were thereafter filed by several parties and were denied on September 7, 1971 (Pet. App. 38–42). In its order denying reconsideration, the Commission rejected the argument that full evidentiary hearings must be held prior to determining just and reasonable rates. It stated that the contention was "both premature and untenable at this stage of the proceeding" because "no evidence has as yet even been submitted" and "[p]etitioners have not set forth with any specificity either the evidence they wish to cross-examine or rebut, or the testimony they have been precluded from presenting" (Pet. App. 40). Moreover, since the petitioners had "not shown that they would be prejudiced by the procedures adopted in our notice" (Pet. App. 41), the Commission ruled that it was permissible to require written submissions in lieu of an oral hearing.

A petition for review was thereupon filed in the court of appeals. Other petitions, filed later in the District of Columbia Circuit, were transferred to the court below and there consolidated with the earlier petition.

After some of the comments on the Commission's proposed rulemaking had been submitted, but before the parties' replies were due, several of the parties filed a further motion with the Commission seeking an opportunity to conduct broad cross-examination of

"all persons who contributed to or participated in the preparation of" large portions of the comments and data submitted by other parties (Pet. App. 44). The Commission denied the motions (Pet. App. 43–47). It ruled that "[s]uch an all-encompassing request, lacking in specificity, and without a showing of prejudice * * *, must be rejected" (Pet. App. 44). To grant the motion "would require the return to the lengthy, adjudicatory hearings * * *, which we stated we desired to avoid" (*ibid.*). "We need not * * * lose ourselves in an excursion into detail which would obscure, rather than clarify, the issues before us" (Pet. App. 44–45).

The Commission thereafter denied another set of motions to reconsider its order denying cross-examination (Pet. App. 48–50). Additional petitions for review were then filed in the courts of appeals and transferred to the court below for consolidation with the earlier petitions.

C. THE DECISION BELOW

The court of appeals, with one judge dissenting, denied the petitions for review (Pet. App. 1–28). The court first considered, *sua sponte,* whether the Commission's orders were ripe for judicial review. It concluded that they were, because the petitions for review presented "a pure question of law" and because "the hardship to the petitioners which would result from refusal to review the question would be of great magnitude" (Pet. App. 10).

On the merits, the court held that the hearing requirement of Section 5 of the Natural Gas Act could

be satisfied by the informal rulemaking procedures adopted by the Commission. Relying on Section 15(b) of the Act,[7] and on this Court's opinion in *Permian*, the court concluded that the Natural Gas Act does not require a formal evidentiary hearing in an area rate-making proceeding. The court also held that, since Section 5 does not require a hearing "on the record," the Administrative Procedure Act permits the Commission to use the informal rulemaking procedures of 5 U.S.C. 553, rather than the formal procedures of 5 U.S.C. 556 and 557. It concluded that the procedures prescribed by the Commission's original notice satisfied the requirements of Section 553.[8]

ARGUMENT

The court of appeals properly rejected petitioners' principal contention that the Commission may not set area rates except after full evidentiary hearings with opportunity for oral cross-examination. With respect to that issue, the courts of appeals are in harmony and review by this Court is not warranted.

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[7] That Section provides in part: "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act."

[8] After this case was decided by the court of appeals, the Commission proceeded in accordance with its original notice. On April 11, 1973, it issued Order No. 658, which established maximum just and reasonable rates for sales under contracts dated prior to October 1, 1968, and maximum initial rates for sales under contracts dated between October 1, 1968, and June 17, 1970. Petitions for reconsideration were thereafter denied. Several parties then filed a petition for review in the Court of Appeals for the District of Columbia Circuit (*Exxon Corp., et al.* v. *Federal Power Commission, et al.*, No. 73-1854). On September 24, 1973, that court ordered that the petition be held in abeyance pending this Court's disposition of the present case.

In their Supplemental Brief, petitioners call the Court's attention to a recent decision of the Court of Appeals for the District of Columbia Circuit, which they claim is in conflict with the decision below. It is true that the two courts are in plain disagreement over the abstract issue whether the bare minimum required by the APA for informal rulemaking suffices in a Federal Power Commission rate proceeding. As we show below, however, the decisions themselves are reconcilable despite the conflict in reasoning. Moreover, the issue on which the two courts have expressed theoretical disagreement is of minimal importance, because the Commission has determined for cases to employ procedures that would satisfy the requirements of both courts.

1. Petitioners contend (Pet. 7–13) that the ratemaking procedure set forth in the Commission's notice of proposed rulemaking in this case would violate the due process clause of the Fifth Amendment, because it does not permit "cross-examination [or] effective rebuttal" (Pet. 13) and because it portends a decision based on matters outside the record. The contention is both factually and legally incorrect.

First, while it is true that the procedure established by the Commission does not allow for oral cross-examination by the parties, it does ensure an opportunity for "effective rebuttal." The notice provides that composites of the data submitted in this proceeding will be available for public inspection at all times, and it affords all parties an opportunity to submit both written comments and replies to the comments of

other parties (Pet. App. 31–32). This procedure satisfies the notice and hearing requirements of the due process clause. There is no constitutional right to an oral hearing with opportunity for cross-examination where, as here, the proposed ratemaking would be "applicable across the board to all" the parties and where "[n]o effort was made to single out any particular [party] for special consideration based on its own peculiar circumstances" (*United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 246).

Second, the Commission never stated an intention to consider extra-record information. The statement quoted by petitioners (Pet. 12)—that the Commission proposed to "bring to bear data and expertise * * * gained in related proceedings"—does not relate to this case. It appears in a notice of proposed rulemaking with respect to nationwide just and reasonable rates, which was issued on April 11, 1973, long after the issuance of the orders in this case and, indeed, after the issuance of the opinion of the court below.[9]

2. Petitioners next contend (Pet. 14–19) that the procedures established by the Commission would vio-

[9] While the Commission's statement is not part of the record in this case, we note that the Constitution does not prohibit an administrative agency from bringing to bear in a particular proceeding general information and regulatory experience acquired over the years through the exercise of its statutory responsibilities. See *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 559–561; *City of Chicago* v. *Federal Power Commission*, 458 F. 2d 731, 745–748 (C.A.D.C.), certiorari denied, 405 U.S. 1074.

late both the Natural Gas Act and the Administrative Procedure Act. This contention is apparently made under two theories.

a. First, petitioners argue that the formal hearing procedures of Sections 556 and 557 of the Administrative Procedure Act must be followed in Federal Power Commission rate proceedings. But those Sections—which require a full evidentiary hearing before a hearing officer, an initial decision, and review by the Commission—come into play with respect to rulemaking only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c)).

Accordingly, "Sections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record."'" *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757. That rule applies in the context of agency ratemaking. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224. Neither the ratemaking provisions (Sections 4 and 5) nor the rulemaking provisions (Section 16) of the Natural Gas Act, 15 U.S.C. 717c, 717d, 717o, require a hearing "on the record."

We recognize, of course, that those specific words are "not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings" (*Florida East Coast, supra,* 410 U.S. at 238). But the two courts of appeals that have addressed the

issue—the court below and the Court of Appeals for the District of Columbia Circuit—have correctly concluded that neither the provisions of the Natural Gas Act nor its legislative history supports petitioners' contention that the Act requires a formal evidentiary hearing in Federal Power Commission ratemaking proceedings. See Pet. App. 15–18; *Mobil Oil Corp.* v. *Federal Power Commission*, C.A.D.C., No. 72–1471, decided July 11, 1973 (Pet. Supp. Br. App. 22–24).

Petitioners seek to contrive the equivalent of an "on the record" requirement by looking to the provisions, contained in other sections of the statute, that "records * * * shall be kept" of hearings before the Commission (Section 15(a)), that upon the filing of a petition for review the Commission shall file with the court the record on which the challenged order was issued (Section 19(b)), and that the Commission's findings shall be conclusive if supported by substantial evidence (Section 19(b)). These innocuous requirements—the first two of which impose only ministerial obligations on the agency—add nothing to the "after a hearing" language in Section 5(a). Viewed in the light of Section 15(b)—which specifies that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation"—the isolated words cited by petitioners surely do not amount to an "on the record" requirement that would invoke the formal procedures of Sections 556 and 557.

b. In their supplemental brief, petitioners suggest a more limited argument—that even if a formal eviden-

tiary hearing is not necessary, something more than the bare minimum for informal rulemaking is required. They rely on *Mobil Oil Corp.* v. *Federal Power Commission, supra,* which they say conflicts with the decision below. There is no doubt that the two courts have expressed disagreement over the theoretical issue whether the barebones requirements of Section 553 of the Administrative Procedure Act—which requires only notice and an opportunity to submit "written data, views, or arguments"—would suffice in a Commission rulemaking proceeding. Properly viewed, however, the decisions themselves are not in conflict.

In the order under review in *Mobil,* the Commission had set minimum pipeline rates for the transportation of certain liquid and liquefiable hydrocarbons. As the court of appeals' opinion details (Pet. Supp. Br. App. 8–14), the Commission issued its order without having given adequate public notice that it intended to fix minimum rates in the proceeding; "in fact, the implication was to the contrary" (*id.* at 9). Consequently, no data or comments were submitted with respect to the question of rates. Two and one-half years after the original public notice, the Commission staff convened a conference of the parties to seek factual data bearing on minimum rates, but the request was deferred pending the disposition of a similar rate issue in another proceeding. Thereafter, without further notice or evidence, the Commission established the minimum rates at issue.

On these facts, the court of appeals held that the Commission failed to give fair notice and to compile an adequate record (Pet. Supp. Br. App. 50). It also held, alternatively, that something more than the minimum notice and comment requirements of Section 553 must be accorded to parties in a Commission rulemaking proceeding. The Court reasoned as follows: Section 19(b) of the Natural Gas Act requires the courts to sustain Commission findings that are supported by "substantial evidence"; this implies that there must be substantial evidence "on the whole record"; a "whole record" requires "some sort of adversary, adjudicative-type procedures" (*id.* at 41). These procedures, it held, need not be formal and need not include an opportunity for oral presentation, but they "must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others" (*id.* at 40; emphasis omitted). The court expressly disagreed with the contrary reasoning of the court of appeals in the present case (*id.* at 46–47).

We agree that the reasoning of the two courts differs on the abstract question whether the Commission may properly set rates through the minimum procedures required under Section 553 of the Administrative Procedure Act. We submit, however, that there is no need for this Court to resolve that theoretical disagreement in this case.

First, the decisions below are reconcilable. The procedures followed by the Commission in *Mobil* could not have met even the minimal requirements of the opinion below, and the procedures followed in the

present case might well have satisfied the higher standards of the *Mobil* opinion. The court in *Mobil* specifically stated (Pet. Supp. Br. App. 50) that, even if it had agreed with the reasoning of the court below in the present case, "the lack of fair notice and an adequate record on which the prices were set here would still require us to remand this case." Conversely, the procedures followed by the Commission in the present case—including submission of data by the parties, reconciliation of that data by the Commission staff, opportunity to submit comments in light of that reconciliation, and further opportunity to respond to the comments of other parties—probably would satisfy the D.C. Circuit's requirement in *Mobil* of a "mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others" (*id.* at 40; emphasis omitted).

Second, even if the conflict in *reasoning* would otherwise justify review by this Court, that conflict is of little continuing importance. The Commission has determined to follow, in the national rulemaking proceedings that are currently pending,[10] procedures similar to those followed in the present case. Thus, the issue on which the courts of appeals disagree—*i.e.*, whether the Commission *could* get by on less—need not be resolved at this time.

[10] The Commission has commenced proceedings to set nationwide just and reasonable rates for sales of gas from wells commenced on or after January 1, 1973 (38 Fed. Reg. 10014) and from wells commenced before January 1, 1973 (38 Fed. Reg. 14295).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 73-91

CHEVRON OIL COMPANY, WESTERN DIVISION; AMERADA HESS CORPORATION; EXXON CORPORATION; MARATHON OIL COMPANY; and TEXACO INC.,

Petitioners,

vs.

FEDERAL POWER COMMISSION; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; ATLANTIC RICHFIELD COMPANY; BELCO PETROLEUM CORPORATION; BETA DEVELOPMENT COMPANY; CONTINENTAL OIL COMPANY; GULF OIL CORPORATION; HIGH CREST OILS, INC.; SKELLY OIL COMPANY; SUN OIL COMPANY; TENNECO OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; THE STATE OF NEW MEXICO; FOUR CORNERS GAS PRODUCERS ASSOCIATION; UNITED DISTRIBUTION COMPANIES; EL PASO NATURAL GAS COMPANY; PUBCO PETROLEUM CORPORATION; SOUTHERN CALIFORNIA GAS COMPANY; AZTEC OIL & GAS COMPANY; AND SHELL OIL COMPANY,

Respondents.

Reply Brief

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Reply Brief

The Brief for the Federal Power Commission in Opposition attempts to evade the issue which the decision below and the *Mobil* decision[1] have placed squarely before this

1. *Mobil Oil Corporation v. Federal Power Commission* (D.C. App. 1973) 483 F.2d 1238; see Supplemental Brief in Support of Petition for a Writ of Certiorari.

Court—an issue involving the most significant assault upon accepted due-process procedures in the history of administrative regulation of rates in the petroleum industry.

It is impossible to accept the argument that the decision below and *Mobil* are reconcilable (Brief in Opposition, p. 14) when the latter squarely and expressly contradicts the former on the very point at issue here.[2] The decision below holds that testing by either oral or written cross-examination and a known record are not essential to the ratemaking process and may be dispensed with as the Commission did below (and avowedly will do in the current national proceeding—Brief in Opposition, p. 15); while *Mobil* holds that these processes are essential and cannot be dispensed with even though full "formal rule-making" with a full adjudicatory hearing may not be required.

And although the Brief in Opposition argues that the issue "is of minimal present importance, because the Commission has determined for pending producer rate cases to employ procedures that would satisfy the requirements of both courts" (Brief in Opposition, p. 9), in fact the procedures announced by the Commission, omitting the right to cross-examination and to a known all-inclusive record, violate the very elements which *Mobil* holds indispensable:

> "A 'whole record,' as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and

2. "With all due respect, we disagree wtih the two majority judges in *Phillips* in their construction of the breadth of discretion granted the Commission to formulate rules. We agree with dissenting Judge Seth, who based his position in part on the failure of the procedures used by the Commission to create a record that would adequately support the factual findings and permit judicial review, a factor which plays a large part in our decision here" (*Mobil Oil Corporation v. Federal Power Commission*, supra, Appendix. Supplemental Brief in Support of Petition for a Writ of Certiorari, pp. 46-47, 483 F.2d at p. 1262).

> illumination ordinarily associated with adversary, adjudicative procedures. * * * Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates" (*Mobil Oil Corporation v. Federal Power Commission,* Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 43; 483 F.2d at p. 1260),

and which have been repeated over and over by this Court:

Int. Com. Comm. v. Louis. & Nash. R. R. (1913) 227 U.S. 88, 93-94;

Ohio Bell Tel. Co. v. Comm'n (1937) 301 U.S. 292, 300;

Morgan v. United States (1936) 298 U.S. 468, 479-480;

West Ohio Gas Co. v. Comm'n (No. 1) (1935) 294 U.S. 63, 69.

While the *Mobil* court determined that oral cross-examination was not essential and that a form of written cross-examination might suffice, a conclusion with which we disagree, it left no doubt that the submission of "mere comments"[3] permitted in this case, on which the Solicitor General heavily relies (Brief in Opposition, p. 15) is inadequate:

> "Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate" (*Mobil Oil Corporation v. Federal Power Commission,* supra, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 43, 483 F.2d at p. 1260).

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3. *Mobil Oil Corporation v. Federal Power Commission,* supra, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 48, fn. 92, 483 F.2d at p. 1263, fn. 92.

In the present case, the procedure adopted by the Commission did not go beyond the submission of "mere comments." And, according to the Solicitor General, the Commission now intends to ignore the *Mobil* decision by following the same deficient procedures in setting rates for the entire nation in one vast rulemaking proceeding.

Semantics of "formal" and "informal" aside, the flat-out deprivation of all right of testing and exploration by cross-examination and of the right to be advised on the record of all data relied on by the Commission in making the judgments underlying its ratefixing process is the fundamental issue which divides the court below and the *Mobil* court.

These rights the court below has specifically denied. Though the Commission's procedures in *Mobil* were subject to additional infirmities, there is no denying that the *Mobil* court has established minimal requirements which the court below casts aside.

This issue is far from an abstraction (Brief in Opposition, p. 14). It is an issue of constitutional and statutory right which makes the difference between administrative regulation which is fully informed and equipped to meet the extreme exigencies of today, and an administrative absolutism immune from any effective judicial oversight and protection.[4]

Deprivation of a constitutional right in this manner is not excused because the end result of the administrative process would be "applicable across the board" to a number of parties rather than to a single one (Brief in Opposition.

4. "As the record stands, in reviewing the Commission's action we are unable to decide whether its factual determinations are supported by substantial evidence. Much of the evidence appears possibly suspect, we have no way of knowing from the record whether the figures are valid" (*Mobil Oil Corporation v. Federal Power Commission*, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 42; 483 F.2d at p. 1259).

p. 10). In arguing the contrary, the Brief in Opposition strains *United States v. Florida East Coast R. Co.* (1973) 410 U.S. 224, beyond any fair interpretation of its words or its effect.

Most startling of all is the Opposition's reliance on the provision of § 15(b) of the Natural Gas Act[5] (Brief in Opposition, p. 12) that "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation." To equate the denial of rights and processes so fundamental to constitutional protection as are the rights in issue here with mere "informality" is a perversion of statutory wording and intent which empties the Fifth Amendment of all substance.

The importance of settling this issue, which challenges long-accepted fundamentals of the administrative process, cannot be minimized.

The Brief in Opposition evades, rather than answers, the fundamental issue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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